Supreme Court of the United States

OCTOBER TERM, 1913.

No. 1012.

ANTONIO MUSICA ET ALS.

versus

EZRA P. PRENTICE, RECEIVER IN BANKRUTCY OF A. MUSICA & SON ET ALS.,
Appellee,

LAZARUS, MICHEL & LAZARUS,
Intervenor, Appellant.

Motion to Dismiss or Affirm.

Now into Court comes Ezra P. Prentice, Receiver of **A. Musica & Sons et als.**, bankrupts, appellee in the above

numbered and entitled cause, and moves the Court to dismiss the appeal taken in the said cause by Lazarus, Michel & Lazarus, intervenor, from the decree of the United States Circuit Court of Appeals for the Fifth Circuit, and, in default of dismissing said appeal, to affirm the decree of said Court; and for cause and ground of this motion to dismiss or affirm, says:

I.

This Honorable Court is without jurisdiction to review on appeal the judgment and decree of the Circuit Court of Appeals for the Fifth Circuit rendered and entered in this cause upon the intervention of Lazarus, Michel & Lazarus, for the reason that said judgment and decree are, in accordance with the law in such cases made and provided, and particularly the provisions of the Bankruptcy Statute of the United States, final in the said Circuit Court of Appeals for the Fifth Circuit, and, therefore, no appeal will lie to this Court.

II.

The proceeding sought to be reviewed on appeal in this Court is a "proceeding in bankruptcy," and is not among that class of such proceedings in bankruptcy as may or can be reviewed in this Court; the appeal herein was not taken in accordance with the Bankruptcy Stat-

utes and General Order No. 36 in Bankruptcy, but under Section 6 of the Circuit Court of Appeals Act, now Section 128 of the Judicial Code. This cause, involving a "proceeding in bankruptcy," is controlled by the provisions of the Bankruptcy Act and not by the Judicial Code.

III.

In the event that this Honorable Court should refuse to grant the foregoing motion and should maintain its jurisdiction on the said appeal, then mover prays that the said decree of the Circuit Court of Appeals for the Fifth Circuit be affirmed, as it is manifest that the appeal was taken for delay and that the questions upon which decision of the said cause depend are so frivolous as not to need further argument.

IV.

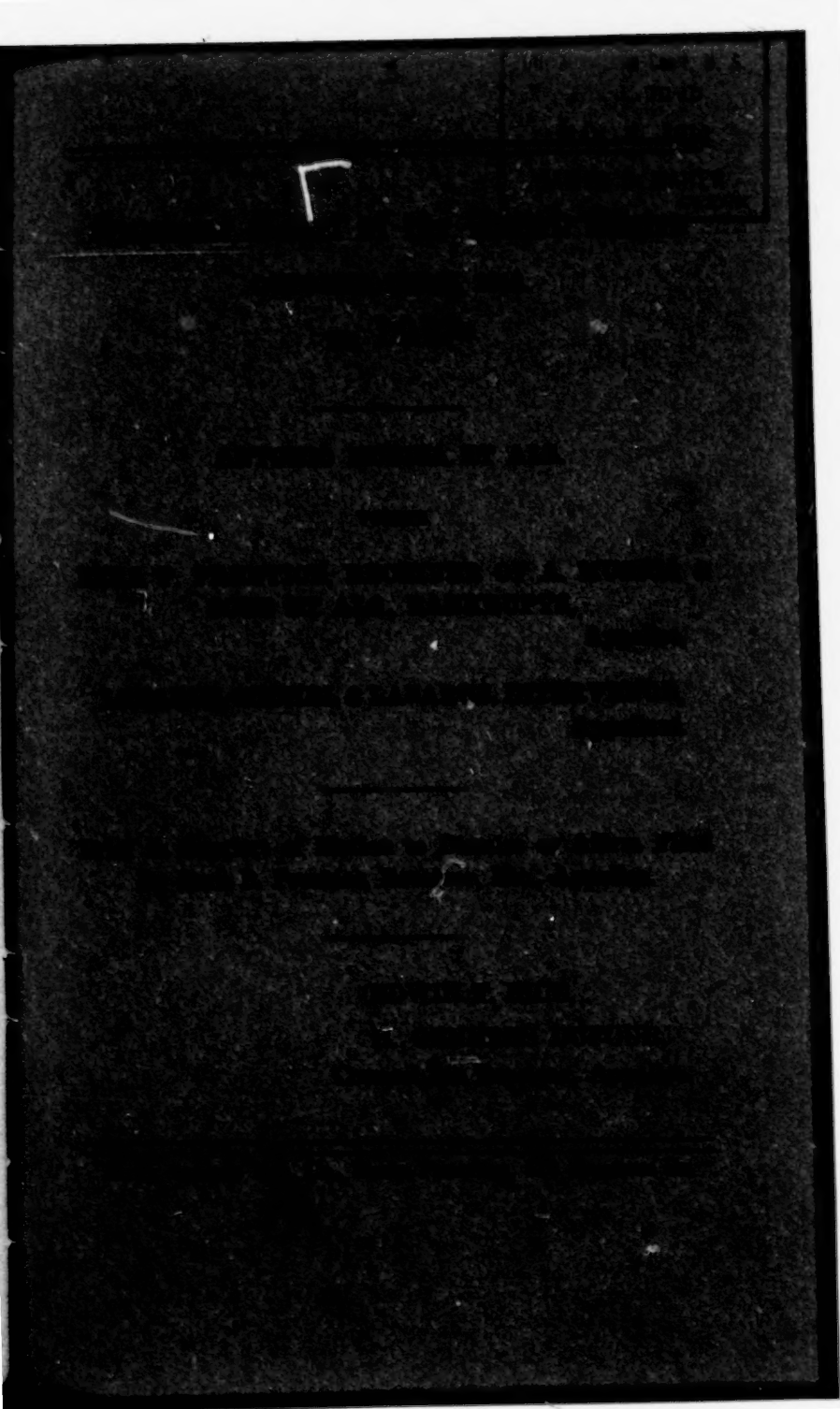
Mover avers that notice of intention to present this motion was given to and a copy of the brief filed in support of same, was served upon Lazarus, Michel & Lazarus, intervenor, and upon counsel for intervenor, as provided for in the rules of this Court, and that proof thereof accompanies this motion.

Wherefore, mover prays that the appeal of Lazarus, Michel & Lazarus, intervenor, be dismissed, and, in the alternative, that the decree of the Circuit Court of Appeals for the Fifth Circuit, upon the intervention of the said Lazarus, Michel & Lazarus, intervenor, be affirmed.

And mover shall ever so pray.

EDWIN T. RICE,

H. GENERES DUFOUR,
Attorneys for Receiver, Mover and Appellee.



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EZRA P. PRENTICE, RECEIVER OF A. MUSICA & SONS ET ALS., BANKRUPTS,

Appellee,

LAZARUS, MICHEL & LAZARUS, INTERVENOR,

Appellant.

Brief in Support of Motion to Dismiss or Affirm Filed By Ezra P. Prentice, Receiver, Etc., Appellee.

MOTION TO DISMISS.

There was instituted by the receiver in the District Court and within the ancillary bankrupt case a separate summary proceeding against each of Anto-

nio Musica, Philip Musica, Arthur Musica and Lucy Grace Musica. In these proceedings Lazarus, Michel & Lazarus intervened, asserting rights under the aforementioned assignments. The District Court rendered four separate judgments granting the relief prayed for by the receiver, and directed that the money and property be turned over to the receiver; at the same time it dismissed the intervention of Lazarus, Michel & Lazarus. All of the Musicas, through Lazarus, Michel & Lazarus, attorneys, and Lazarus, Michel & Lazarus, intervenor, took an appeal to the Circuit Court of Appeals for the Fifth Circuit. Lazarus, Michel & Lazarus, intervenors, alone praying for and obtaining a supersedeas. The Circuit Court of Appeals affirmed the judgment of the District Court. All four of the Musicas, through Lazarus, Michel & Lazarus, attorneys, and Lazarus, Michel & Lazarus, intervenors, applied to said Court for appeals to this Court. The applications of the Musicas were denied, upon the ground that as to them the proceedings were "proceedings in bankruptcy, and therefore were final in the Circuit Court of Appeals; the application of Lazarus, Michel & Lazarus, intervenor, was granted with supersedeas.

As stated above, there were instituted in the District Court as an ancillary Court of Bankruptcy, four certain summary proceedings, one against each of **Antonio Musica and Philip Musica** (the bankrupts), and **Arthur Musica** and **Lucy Musica** (the young children of **Antonio Musica**). In these proceedings the Receiver in Bankruptcy sought to have summarily turned over to him for administration in the bankruptcy estate certain property

which the receiver alleged belonged to the bankrupts, and which had been found at the time of the bankrupts' arrest either on the persons of the bankrupts or upon the persons of other members of the family who, with the bankrupts, were fleeing from the country. The greater part of the money was found upon the persons of Lucy Grace and Arthur Mustea, who held the money and property for account of the bankrupts; these two so admitted in their affidavits filed in the summary proceedings; in these affidavits they disclaim any title or interest in the money and property found on their persons, except in certain unimportant particulars having no bearing upon the issue in this case; and they aver that the money and property belonged to the bankrupts and were given to them by one of the bankrupts (the brother) the morning of their arrest. The proceedings below, therefore, involve the right of the Receiver to require the bankrupts and their agents to summarily turn over to the Receiver property admittedly belonging to the bankrupts. Proceedings of this character, that is to say, "summary proceedings," have been recognized and resorted to in a number of cases, notably the cases of **Muller vs. Nugent, 184 United States, 1; In re Franklin & Son, 197 Federal, 599; In re Friedman, 141 Federal Reporter, 260; In re Norris, 177 Federal Reporter, 598; In re Weinrot, 146 Federal Reporter, 17; In re Frankfort, 144 Federal Reporter, 721.**

In all of these cases, the right of a Receiver to institute a "summary proceeding" in the Bankruptcy Court, and within the bankruptcy proceeding to compel the summary delivery of property held or concealed by the bankrupt, or his agent, has been affirmed. These pro-

ceedings taken in the Bankruptcy Court by the Receiver to compel the immediate and summary surrender of property admittedly belonging to the bankrupts, title to which by law vested in such Receiver, is a step in the administration of the bankruptcy estate—what might be considered the first step—being the effort of the Receiver to take possession of the property placed in **custodio legis** by the bankruptcy law. This is certainly a "proceeding in bankruptcy" within the meaning and intendment of the bankruptcy statute as distinguished from a "controversy in bankruptcy" as recognized by such statute.

Subsequently to the filing of the summary proceeding, or "proceeding in bankruptcy," against each of the four parties aforesaid, Lazarus, Michel & Lazarus, appellants in this Court, intervened in the said summary proceedings and asserted a claim to a portion of the property which the Receiver sought to have summarily surrendered to him upon the ground that a portion of the said property—$15,000—had been assigned by the bankrupts and those members of the family upon whom the property was found at the time of their arrest to the said Lazarus, Michel & Lazarus, attorneys-at-law, in payment of fees for services to be rendered by Lazarus, Michel & Lazarus, intervenors, to the bankrupts and the members of their said family in resisting extradition from the State of Louisiana to the State of New York, and in services thereafter to be performed in the Bankruptcy Court. The claim of the intervenor was denied in the Court below and its intervention dismissed, except to the extent of a certain sum of $189.00, with which we

are not concerned in this cause; and on appeal this judgment was affirmed by the Circuit Court of Appeals. The opinion of the Circuit Court of Appeals is printed as an appendix to this brief.

Lazarus, Michel & Lazarus base its right to an appeal from the Circuit Court of Appeals to this Court upon the ground that its intervention in the summary proceedings was a "controversy in bankruptcy," and that, therefore under the authority of the decisions of this Court in **Knapp vs. Milwaukee Trust Co., 216 United States, 545**, and **Hewitt vs. Berlin Machine Works, 194 United States, 296**, the decision of the Circuit Court of Appeals is not final, but the right of appeal to this Court exists under the general law, that is, under the Court of Appeals Act of 1891, or under the present Judicial Code of the United States.

Other decisions in point are:

Tefft vs. Munseri, 222 United States, 119.
Code vs. Arts, 213 United States, 223.
First National Bank vs. Title & Trust Co., 198 United States, 290.
Holden vs. Stratton, 191 United States, 115, 115.

Under the law as interpreted by the decisions aforementioned, there arise in the administration and settlement of a bankruptcy estate, either "proceedings in bankruptcy" or "controversies in bankruptcy." There can be little doubt but that the original proceedings taken by the Receiver in this cause against the bankrupts and their agents were "proceedings in bank-

ruptcy " These proceedings were subject to review in the Circuit Court of Appeals solely upon petition for review in accordance with the provisions of the bankruptcy statute, and as recognized in the foregoing decisions. The decision of the Circuit Court of Appeals upon a petition for review is final, except in the few cases provided for in the bankruptcy statute and noted in the foregoing decisions. The appellant in this case, the intervenor, has not rested his right of appeal upon the authority of this Court to review the decision of the Court of Appeals upon a "petition to review," but squarely asserts that jurisdiction vests in this Court upon appeal because of the fact that the issue is a "controversy in bankruptcy" and that therefore the decision of the Court of Appeals is not final.

It will be observed that the decisions of this Court above referred to, in which an intervention asserting a lien upon property in possession of the Trustee was held to be a "controversy in bankruptcy," involved cases where the asserted right arose previous to the bankruptcy; that is to say, previous to the moment when the property vested in the Bankruptcy Court for administration under the bankruptcy act.

In the instant case, it is admitted that the assignments sued upon by the intervenor bear date and were executed subsequent to the filing of the petition in involuntary bankruptcy in the Southern District of New York, subsequent to the filing of the ancillary proceedings in the Eastern District of Louisiana. In these circumstances it is contended that the original "proceedings in bankruptcy" filed by the re-

ceiver against the bankrupts and their agent could not be changed to a "controversy in bankruptcy" by the intervenor by asserting a right which the intervenor admits arose after the filing of the involuntary bankruptcy proceeding and after intervenor had knowledge that said proceedings had been filed. The decisions of this Court above referred to pertain to controversies in bankruptcy where the rights arose previous to the bankruptcy. In the case now under discussion, whatever rights intervenor have admittedly have arisen subsequently to the bankruptcy. It would seem patent, therefore, that the summary proceeding, or the "proceeding in bankruptcy," cannot be changed by the intervenor to a "controversy in bankruptcy," and in that way the very purpose of the summary proceeding defeated by the formalities that attend a "controversy in bankruptcy," with its delays and successive appeals.

If a "controversy in bankruptcy" results from the assertion of a right arising since the bankruptcy, then it results that the summary proceeding, administrative in character, may be retarded by a claimant whose rights are otherwise protected, even though the property may be surrendered to the Trustee. It would not seem possible to ingraft upon the "summary proceeding" or "proceeding in bankruptcy," a "controversy in bankruptcy," simply by asserting a right admittedly arising since the bankruptcy. The intervenor at no time had any possession of the property and its rights, if any it has, would have followed the property into the hands of the Receiver as fully and with the same effect as if the property had remained in the possession of the bankrupts.

The claim of the firm of Lazarus, Michel & Lazarus is pitched squarely upon the assignments made in its favor by the Musicas—assignments admittedly executed subsequent to the bankruptcy. (See **Intervention Lazarus, Michel & Lazarus, record 186.)** In argument in the Court below it was suggested by counsel for the intervenor that irrespective of the assignments, intervenor was entitled to a fee for services rendered the bankrupts. The petition of intervention makes no such claim; the intervenor's declared purpose is to obtain $15,000 pursuant to the assignments. Upon this point the Court of Appeals said:

> "We do not understand the intervening petition as asserting a claim under the provisions of the bankruptcy law, and besides, if such claim is asserted, it must be decided by the New York Bankruptcy Court, having jurisdiction of the administration of the bankrupts' estate. **In re Wood vs. Henderson, 210 United States, 246.**"
>
> "The Court below sustained the right of the Receiver to recover the money and securities which were proved to belong to the bankrupts, and dismissed the intervening petition of Lazarus, Michel & Lazarus, reserving to them the right to assert whatever claim they have as counsel fees in the Bankruptcy Court of primary jurisdiction."

The administration of the bankruptcy estate and the reduction of the property of the bankrupts to possession by the Trustee should not be delayed by the intervention or interference of counsel asserting the right to compensation for services rendered to the bankrupts after

the bankruptcy proceedings had been filed, whether the right of counsel results from an assignment executed after the bankruptcy or for services rendered to the bankrupts to be compensated as provided by the statute.

Therefore, on this motion to dismiss, the issue narrows itself down to this: Does the intervention under the circumstances aforementioned change the original proceeding from a "proceeding in bankruptcy" to a "controversy in bankruptcy"? Can the right of the receiver to take possession of the property of the bankrupt estate be delayed or defeated by an intervention asserting a claim admittedly arising since the bankruptcy proceeding?

The question should be answered in the negative, from which it follows that the decree of the Circuit Court of Appeals is final and, under the bankruptcy law, which exclusively applies, there is no apepal to this Court; the case does not fall within the provisions of Section —— of the bankruptcy statute.

While this question is **res nova,** we do not believe that the principles underlying the bankruptcy law will permit such a proceeding as that instituted by the intervenor to retard the administration of the estate.

It would seem that the judgment of the District Court should have been reviewed in the Circuit Court of Appeals upon a "petition for review," and that the decree of the Circuit Court of Appeals upon such petition to review is final and not subject to review in this Court. Notwithstanding the fact that the review in the Court of Appeals was on **appeal,** it was proper to consider same as on petition for review. **191 United States, 115.**

We are, therefore, of the opinion that the motion to dismiss should prevail and the appeal of Lazarus, Michel & Lazarus, intervenor, should be dismissed. In default, however, of the Court taking this view, we believe that an examination of the record and a reading of the opinions of the District Court and of the Circuit Court of Appeals, respectively, will demonstrate that this appeal was taken for delay and that the questions upon which the decision depended were and are so frivolous as not to need further argument.

We proceed to the discussion of the

MOTION TO AFFIRM.

On March 19th, Antonio Musica and his children, Philip Musica, Arthur Musica, George Musica, Lucy Grace Musica and Louise Musica, were arrested in the City of New Orleans on board Steamship "Heredia," then lying in the port of New Orleans and about to sail for Central America. Antonio Musica was travelling under the name of F. Martens; Philip Musica and his sister, Lucy Grace Musica, were travellign as man and wife under the name of Mr. and Mrs. W. D. Weeks; Arthur Musica was travelling under the name of Roger Weeks; George Musica was traveling under the name of L. Martens; Louise Musica as Miss Martens.

The arrest was made by the local detectives under the direction of the Chief of Detectives and operators of the

Burns Detective Agency. The prisoners were taken from the ship to the Police Station, where the four men were charged with being fugitives from justice from the State of New York, and the two women were charged with being material witnesses. Indictments had already been found and presented by the Grand Jury of New York County. The purpose in charging the women with being material witnesses was to use them in order to establish the identity of the four men for the purpose of meeting the requirements of the extradition statutes in the event that a fight against extradition to the State of New York was made. The record shows that a determined but unsuccessful fight was subsequently made against extradition. Upon the prisoners being searched at the Police Station, the following articles were found upon their respective persons:

On Antonio Musica:

Seven Hundred and Thirty-Five and 05/100 Dollars ($735.05) in money of the United States, being five (5) notes of the denomination of One Hundred Dollars ($100) each; two (2) of the denomination of Fifty ($50) Dollars each; five (5) of the denomination of Twenty Dollars ($20) each; three (3) of the denomination of Ten Dollars ($10) each; one (1) of the denomination of One Dollar ($1.00) and silver and other coin amounting to Two and 05/100 Dollars ($2.05); and also a policy of insurance in the name of Antonio Musica in the New York Life Insurance Company for Five Thousand Dollars ($5,000), being Number 2,218,823.

On Philip Musica:

1 American Traveler's Check amounting to $300.

2 Railroad tickets to Colon in the name of Mr. and Mrs. W. D. Weeks.

Cash, $91.48.

1 Insurance Policy, Equitable Life Assurance Society of the United States, in the name of Philip M. Musica, for $50,000, No. 1,737,523.

1 Insurance Policy, Equitable Life Assurance Society of the United States, in the name of Philip M. Musica, for $50,000, No. 1,705,462.

1 Insurance Policy, Equitable Life Assurance Society of the United States, in the name of Philip M. Musica, for $50,000, No. 1,727,755.

1 Insurance Policy, New York Life Insurance Company, in the name of Philip M. Musica, for $25,000, No. 4,316,286.

1 Insurance Policy, New York Life Insurance Company, in the name of Philip M. Musica, for $50,000, No. 4,138,300.

1 Mortgage Note in the name of Philip M. Musica, signed by Fred Aleese, for $28,000, on Steamship "Evelyn."

On Arthur Musica:

1 Small Purse containing 79 cents.

1 Black Purse containing $190.

Memorandum and cards.

1 American Express Company's traveler's check containing five $20 each.

6 Five Thousand Dollar Bills.

14 One Thousand Dollar Bills.
2 Five Hundred Dollar Bills.
24 One Hundred Dollar Bills.
2 Fifty Dollar Bills.
37 Ten Dollar Bills.
1 Twenty Dollar Bill.
1 One Hundred Pound Note, Bank of England.
12 Fifty Pound Notes, Bank of England.
18 Twenty Pound Notes, Bank of England.
16 Ten Pound Notes, Bank of England.
76 Five Pound Notes, Bank of England.
2 Five Hundred Lire, Italian notes.
7 One Hundred Lire, Italian notes.
2 Fifty Lire, Italian notes.
6 Ten Lire, Italian notes.

On Lucy Grace Musica:

Eighteen Thousand Six Hundred Dollars ($18,600) in United States Currency, being:

Three notes of the sum of Five Thousand Dollars each.

Two notes of the sum of One Thousand Dollars each.

Fourteen notes of the sum of One Hundred Dollars each.

Four notes of the sum of Fifty Dollars each.

From the person of Arthur Musica there was taken currency of the United States and other countries, aggregating, approximately, $55,000, detailed above. This money was tied in a bag around his stomach under his clothes.

From the person of Lucy Grace Musica there was taken currency, aggregating Eighteen Thousand Six Hundred Dollars, detailed above. This money was hidden in her corset.

The testimony in this case shows that Antonio Musica and his son, Philip Musica, were doing business in the City of New York under the firm name A. Musica & Son; that they were extensive importers of human hair; that they had defrauded certain banks, bankers and other persons in the City of New York, out of sums of money approximating Nine Hundred Thousand Dollars ($900,000); that they had accomplished these frauds by the importation of hair and other articles alleged to be of great value, whereas, in truth and in fact, the boxes covered by the bills of lading contained sawdust or other worthless material.

The evidence further shows that the Musicas had decamped from the City of New York on March 10th, 1913, and were not seen until they were trailed to the De Soto Hotel in New Orleans, and thence to the Steamship "Heredia" and arrested under the circumstances aforesaid.

In the testimony of the Inspector of Police Reynolds (R., p. 93), Chief of Detectives Mouney (R., p. 108), and Detective Sheffler (R., p. 111), the details concerning the arrest and search of the prisoners are fully set forth. The money and property aggregating, approximately, One Hundred Thousand Dollars, taken from the persons of the defendants at the time of their arrest, were deposited by the Chief of Police for safekeeping in the New Orleans National Bank of this city.

On March 18, 1913, a petition in involuntary bankruptcy was filed against A. Musica & Son, and the individual members of said firm, Antonio Musica and Philip Musica, in the District Court of the United States for the Southern District of New York, and on March 20th, 1913, said Court appointed Ezra P. Prentice receiver in bankruptcy of A. Musica & Son, Antonio Musica and Philip Musica. The receiver furnished bond and qualified as required by law. Certified copies of the aforesaid proceedings in the District Court of the United States for the Southern District of New York will be found in the record, pages 188 to 129.

On March 22, 1913, the said Ezra P. Prentice, receiver in bankruptcy, filed a petition in the District Court of the United States for the Eastern District of Louisiana at New Orleans, praying that he be confirmed as temporary receiver in said jurisdiction, with full power and authority to take immediate possession of all of the assets and property of every kind or nature belonging to the firm of A. Musica & Son, and Antonio Musica and Philip Musica, the individual members thereof, situated within the jurisdiction of said Court, and to hold same subject to the further orders of said Court; and the said petitioner further prayed that ancillary proceedings be taken and had in said jurisdiction with a view of summoning witnesses and forcing the production of books, papers and other documents to the end of dicovering if there were any assets or property of the alleged bankrupts within the jurisdiction of said Court. (Record, p. 5.) On the same day the Judge of the United States District Court for the Eastern District of Louisiana con-

firmed the appointment of said temporary receiver, directed him to take possession and custody of all property and assets belonging to the alleged bankrupts and situated within the jurisdiction of said Court, and referred the said matter to the referee in bankruptcy to the end that witnesses might be summoned and books, papers and documents produced to discover what assets and property there might be within said jurisdiction. (Record, p. 8.)

On April 1, 1913, Ezra P. Prentice, receiver in bankruptcy aforesaid, filed the aforesaid four certain petitions in the District Court at New Orleans; one against each of Antonio Musica, Philip Musica, Lucy Grace Musica and Arthur Musica, in which the receiver sought to have **summarily turned over** to him all of the money and property found upon their respective persons, hereinabove described in detail, upon the ground that said money and property belonged to the alleged bankrupts. (Record, p. 22, **et seq.**)

On April 25, 1913, Ezra P. Prentice, receiver in bankruptcy aforesaid, filed a supplemental petition against each of the said Antonio Musica, Philip Musica, Lucy Grace Musica and Arthur Musica; these supplemental petitions amplified the recitals in the original petitions theretofore filed and averred the actual adjudication of the defendants as bankrupts (Record, p. 71, **et seq.**); the New Orleans National Bank, in whose safekeeping the Inspector of Police had placed the said money and property at the time it was taken from the persons of the prisoners, was made a party to the foregoing proceedings.

Exceptions to the jurisdiction were filed by all of the defendants, all of which were overruled by the Court. Thereafter, the defendants each filed answer contesting the authority of the plaintiff to sue, asserting that the money had been taken from the persons of the defendants and was held as evidence in the First City Criminal Court of New Orleans, and therefore the United States District Court was without authority to require the First City Criminal Court to turn the money over to it or its officers, and asserting finally that the Court was without authority or jurisdiction to require this money and property to be turned over to the receiver except in a plenary suit filed in due course.

On April 28th, 1913, an before the trial of the summary proceedings, the Judge of the First City Criminal Court of New Orleans, the Court in which the extradition proceedings were taken, entered the following order (Record, p. 134):

> "Considering the appearance of the receiver in bankruptcy of A. Musica & Son, and the individual members thereof, in this Court, by petition in this cause, and the suggestion therein contained, it is ordered that the Court, having no further need for said money as evidence in any cause pending before it:
>
> "**It is ordered,** that the New Orleans National Bank hold said money subject to the orders of the United States District Court for the Eastern District of Louisiana, for this Court, in said proceedings."

This order was made in the First City Criminal Court, to which Antonio Musica, Philip Musica, Arthur Musica

and Lucy Grace Musica, through their counsel, Lazarus, Michel & Lazarus, had previously applied for the restoration of the money and property aforesaid. Record, p. 267.) The District Attorney had previously filed a motion (Record, p. 32) in said cause suggesting that the State had no need for said money and property as evidence, and that the same should be turned over to the United States Court in the pending bankruptcy proceedings.

In other words, the defendants applied to the First City Criminal Court for the restoration of their property. The receiver appeared in the First City Criminal Court and suggested to the Court, with the concurrence of the District Attorney for the Parish of Orleans, that, in view of the fact that the money and property were not needed by said First City Criminal Court as evidence in any cause pending before it, the New Orleans National Bank, the custodian of the money, should hold same subject to the orders of the United States District Court for the Eastern District of Louisiana in the summary proceedings above referred to. It was upon this suggestion that the Judge of the First City Criminal Court entered the above order. Application was then made by counsel for the Musicas to the Supreme Court of Louisiana for relief, but that Court refused to entertain the matter. (Record, p. 237.)

Lazarus, Michel & Lazarus, attorneys at law, intervened in these proceedings, claiming the sum of Fifteen Thousand Dollars for services rendered to the Musicas subsequent to their arrest and after involuntary pro-

ceedings in bankruptcy had been filed. Adams & Generelly, attorneys at law, intervened, claiming Twenty-Five Hundred Dollars for legal services rendered. In order to make certain that they would collect the amount of the said fees, the attorneys above mentioned procured Philip Musica and Antonio Musica, against whom involuntary proceedings in bankruptcy had been filed some two weeks before, to assign all of the money and property taken from their respective persons to John L. Cooran, a stenographer in the office of Lazarus, Michel & Lazarus. The petition in involuntary bankruptcy was filed March 29, 1918; these assignments by the bankrupt are dated April 1, 1918.

Lazarus, Michel & Lazarus obtained a further assignment from Lucy Grace Musica for the sum of Twenty-Five Hundred Dollars towards their aforesaid fee of $15,000, and a further assignment from Arthur Musica of Twelve Thousand Five Hundred Dollars, likewise towards their aforesaid fee. In other words, to secure the payment of their fee of Fifteen Thousand Dollars, Lazarus, Michel & Lazarus obtained assignments from Antonio Musica, Philip Musica, Lucy Grace Musica and Arthur Musica, of all of the money and property taken from their respective persons. For the purpose of recovering this Fifteen Thousand Dollars under the aforesaid assignments, Lazarus, Michel & Lazarus have intervened in these proceedings. Adams & Generelly, likewise, intervened; but they have acquiesced in the judgment and decree of the District Court, and therefore this Court is not concerned with their claim.

Proceeding against Antonio Musica, one of the bankrupts:

The temporary receiver in bankruptcy of A. Musica & Son and Antonio Musica and Philip Musica has taken summary proceedings against Antonio Musica to cause certain property found on the person of the said bankrupt at the time of his arrest to be turned over to him, the said receiver. The receiver's demand is resisted by the defendant and by Lazarus, Michel & Lazarus, assignees. **The assignment under which Lazarus, Michel & Lazarus make their claim was dated and executed two weeks after a petition in involuntary bankruptcy had been filed against Antonio Musica and Philip Musica.**

Claim against Philip Musica, one of the bankrupts:

The receiver sought to have the property taken from the person of Philip Musica summarily turned over to him (the receiver). Philip Musica, like Antonio Musica, was a member of the firm and proceedings in involuntary bankruptcy had been filed against him. Lazarus, Michel & Lazarus claimed under an assignment from Philip Musica, likewise, **made two weeks after the proceedings in involuntary bankruptcy had been filed.**

As to these assignments made after the filing of the petition in bankruptcy, they are absolutely imperative and cannot serve as the foundation of any rights.

The filing of a petition in bankruptcy petrifies the situation, as it were, fixes the rights of all parties and prevents the alleged bankrupt from in any manner dealing with or disposing of their property.

In **Mueller vs. Nugent, 184 United States, 1,** this Court said:

> "The filing of a petition in bankruptcy is a caveat to all the world, and in effect an attachment and injunction, and on adjudication and qualification of trustee the bankrupt's property is placed in the custody of the Bankruptcy Court and the title becomes vested in the trustee."

In **Bryan vs. Bernheimer, 181 United States, 195,** this Court said:

> "But it is a petition filed after an adjudication of bankruptcy and before the appointment of a trustee, and must rest on the authority given to the Court of Bankruptcy, by clause 3 of section 2, to appoint receivers or the marshals, upon application of parties in interest in case the courts will find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified. Does this include property of the bankrupt in the hands of third persons?
>
> "The Bankrupt.Act of March 2, 1867, Chapter 176, Section 40, provided that upon the filing of a petition for an adjudication of involuntary bankruptcy, if probable cause should appear for believing that the debtor was about to remove or conceal, or to make any fraudulent conveyance of his property, the Court might issue a warrant to the marshal commanding him 'forthwith take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the Court.' 14 Stat.

536; Rev. Stat., Sec. 5024. It was held by the Court of Appeals of New York that this did not authorize the marshal to take possession of the goods of the bankrupt in possession of third persons claiming title thereto. Doyle vs. Sharpe, 74 N. Y., 54. But that decision was overruled by this Court, and Mr. Justice Miller, in delivering its opinion, said:

" 'The Act of Congress was designed to secure the possession of the property of the bankrupt so that it might be administered under the proceedings in the bankrupt court. Between the first steps initiating proceedings in the bankrupt court and the appointment of the assignee, a considerable time often passes. During that time the property of the bankrupt, especially in a case commenced by creditors, may be surreptitiously conveyed beyond the reach of the Court or of the assignee, to whose possession it should come when appointed. If the bankrupt does not voluntarily aid the Court, or is inclined to defeat the proceedings, he can, with the aid of friends or irresponsible persons, sell his movable property, and out of the money in his pocket, or secrete his goods or remove them beyond the reach of his assignee or the process of the Court and defy the law. The evidence in this case shows the manner in which this can be done. It was the purpose of the Act of Congress to prevent this evil It is therefore provided that, as soon as the petition in bankruptcy is filed, the Court may issue to the marshal a provisional warrant directing him to take possession of the property and effects of the bankrupt and hold them subject to the further order of the Court To have limited this right or duty

of seizure to such property as he might find in the actual possession of the bankrupt would have manifestly defeated in many instances the purposes of the writ. There is, therefore, no such limitation expressed or implied. As in the writ of attachment or the ordinary execution on a judgment for the recovery of money, the officer is authorized to seize the property of the defendant, wherever found; so here it is made his duty to take into his possession the property of the bankrupt, wherever he may find it. It is made his duty to collect and hold possession until the assignee is appointed or the property is released by some order of the Court, and he would ill perform that duty if he should accept the statement of every man in whose custody he found the property which he believed would belong to the assignee, when appointed, as a sufficient reason for failing to take possession of it. **Sharpe vs. Doyle, 102 U. S., 686, 689, 690.** A like decision was made in **Feibelman vs. Packard, 109 U. S., 421.**

"These considerations are equally applicable to an application after the adjudication in bankruptcy and before the qualification of a trustee, for an appointment of the marshal, under Clause 3 of Section 2 of the Bankrupt Act of 1898, to take charge of 'the property' of the bankrupt 'after the filing of the petition and until it is dismissed or the trustee qualified.' It is true that under this provision the appointment is only to be made 'in case the Courts shall find it absolutely necessary for the preservation of the estates.' But that condition of things is shown, in the present case, by the allegation of the application and the finding of the Court of Bankruptcy,

that it was necessary to the interest of the creditors of the bankrupt to take immediate possession of his property.

"In the opinion of **Bardes vs. Hamilton Bank, 178 U. S., 524, 538,** it was indeed said:

" 'The powers conferred on the Courts of Bankruptcy by Clause 2 of Section S, and by Section 69, after the filing of a petition in bankruptcy, and in case it is necessary for the preservation of property of the bankrupt to authorize receivers, or the marshals to take charge of it until a trustee is appointed, can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant, and have no bearing upon the question in what Court the trustee may sue him.' But the remark, 'Can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant,' was an inadvertence, and upon a question not arising in the case then before the Court, which related exclusively to jurisdiction of a suit by the trustee after his appointment.' "

In passing upon the effect of the assignments of Antonio Musica and Philip Musica, the bankrupts, the Circuit Court of Appeals, in its opinion, which is printed as an appendix to this brief, said:

"On April 28, 1913, the law firm of Lazarus, Michel & Lazarus filed in the Court below an intervening petition claiming $15,000 attorneys' fees for services for representing the Musicas in their defense against the proceeding against them in the City of New Orleans and in the courts of Louisiana

to protect their property rights and possession, and for representing them against proceedings in New York if their services there required. The evidence shows the rendition of valuable legal services by the intervenors to the Musicas. It contains written contracts and assignments showing that the compensation was agreed on by the Musicas as alleged by the intervenors. All of these agreements were made and the professional services rendered after the petition in bankruptcy had been filed against the firm of A. Musica & Son. It seems clear that, as the money and securities are the property of the bankrupts, the other members of the Musica family could create no charge on the property in favor of the intervenors. It is equally clear that A. Musica & Son and the members in bankruptcy could neither directly nor indirectly create any charge on their assets in favor of the intervenors for services to be rendered them in the city and state courts. Provision is made by the Bankruptcy Act, Sec. 64, b, 3, for one reasonable attorney's fee for services rendered the bankrupt in involuntary cases 'While performing the duties herein prescribed.' We do not understand the intervening petition as asserting a claim under the provisions of the bankruptcy law; and, besides, if such claim is asserted, it must be decided by the New York Bankruptcy Court having jurisdiction of the administration of the bankrupt's estate. In re Wood and Henderson, 210 U. S. 246."

Claim against Lucy Grace Musica:

When Lucy Grace Musica was searched at the time of her arrest, $18,600 in United States currency in large

denominations were found on her person. The receiver in bankruptcy filed summary proceedings against Lucy Grace Musica, claiming that the money found on her person belonged to the alleged bankrupts and should be forthwith and summarily turned over to the receiver. Lucy Grace Musica, through Lazarus, Michel & Lazarus, resisted this demand. Subsequently, however, she recanted and her change of heart is made evident by an affidavit which was introduced in this case and is to be found in the record at page 182, and in which she avers that she has no title or claim to the money found upon her person (except to the extent of the one-half interest in $2,500 and the further sum of $60, these items not being involved in this case), and that with the foregoing exception all of the money found upon her person was given to her by her brother, Philip Musica, one of the bankrupts, in the City of New Orleans, on March 18, 1913, the day before they were arrested.

Affiant further states in her said affidavit that she has or had at no time any title to the money and had no objection to urge against its being turned over to the receiver in bankruptcy of A. Musica & Son.

Irrespective of the admission made by Lucy Grace Musica in these affidavits, which admissions are necessarily conclusive and binding, there is sufficient evidence in this record to support the claim of the receiver. This is a summary proceeding in which the receiver asserts that the property should be turned over to him without waiting for the usual delays attending an ordinary proceeding because of the fact that there is no color of right or title to this porperty in Lucy Grace Musica. We re-

peat, irrespective of her affidavit and admissions, there is sufficient evidence to establish the claim of the receiver.

Briefly stated, we find where the members of her family have robbed and defrauded certain banks and bankers in the City of New York out of $900,000. (See the testimony of the officers of these banks and the other victims, which for some reason or other has been left out of the printed transcript, but nevertheless contained in the record in the Circuit Court of Appeals.) When the Musicas were about to be caught in their frauds, they decamped—stole away in the night. The testimony concerning these facts will be found in the record. They were trailed to New Orleans, where they were registered at the Hotel De Soto under assumed names; sister and brother had been travelling as man and wife for the purpose of aiding in the deception. The six Musicas were trailed to a steamship about to leave for Central America; there they were travelling under assumed names; they were confronted by the detectives and at first denied their identity; subsequently when they saw that they were trapped they admitted that they were the Musicas. They were taken to the Parish Prison and there over $100,000.00 of money and property were taken from their persons, $76,000.00 of which was in American and foreign currency. The elder members of the family had little money on their persons; $50,000.00 or more was taken from the person of Arthur Musica, a boy of twenty-one years; it was found in a bag tied around his stomach; $18,000.00 or more was taken from the person of Lucy Grace; it was found hidden in her corset.

Is it asking the Court too much to assume that when thieves have stolen away in the night and fled as these parties are shown to have done; when the loot is found concealed upon their persons in currency of amounts and denominations which no sane and honest person would carry, we say, is it asking too much for the Court to assume, in the absence of a reasonable explanation, that this money constitutes the loot and belongs to the bankrupts and their creditors, and is the fruit of the fraud? What explanation did Lucy Grace Musica offer? What account did she give of the means and methods by which she came into possession of Eighteen Thousand Six Hundred Dollars ($18,600.00), and the reasons why she carried this large amount of money hidden in her corset, in bills of Five Thousand Dollars and the like? Lucy Grace Musica was summoned as a witness before the referee in bankruptcy. Her testimony taken on that occasion in the presence of her counsel, Henry L. Lazarus, a member of the firm of Lazarus, Michel & Lazarus, intervenor, is to be found in the record at page 135. This testimony was offered in evidence on the trial of this cause. It is impossible to have any proper understanding of this testimony unless same be read in full. The effort of the witness to conceal the movements of her family from the time they fled from New York and the evidence of the schooling of the witness in constitutional law and its application by refusing to answer questions that might tend to incriminate her, can be appreciated only by a reading of the testimony. When the witness was pressed to explain how she came into possession of so large a sum of money, she constantly took refuge be-

kind her constitutional right against self-incrimination. She pretended that she had accumulated the money through household economies. When driven to explain the nature and extent of these economies, she took refuge behind her constitutional right against self-incrimination.

Therefore, it is contended that the Court will presume that, where frauds amounting to nearly a million dollars are shown to have been perpetrated by the members of a family who have fled from justice, who are caught on a steamship about to leave the country, travelling under assumed names with large sums of money in currency of large denominations hidden upon the persons of the younger members of the family, such money and property are the fruits of the frauds. No reasonable explanation, in fact no explanation whatever, was at first furnished by Lucy Grace Musica, from whose person Eighteen Thousand Six Hundred Dollars ($18,600.00) was taken. Subsequently, she furnished an affidavit as above set forth, disclaiming any interest in the fund, except in certain immaterial particulars.

Claim against Arthur Musica:

Arthur Musica was travelling at the time of his arrest on the Steamship "Heredia" under the name of Roger Weeks. He is a boy of twenty-one years of age. On his person and in a belt tied around his stomach and under his clothes, Fifty-Six Thousand Dollars ($56,000.00) in currency of the United States and of other countries, in bills of large denominations, were found. When the money was taken from his person he was asked how he

came by it, and he answered that it belonged to his father and that he was saving it for him. (Testimony of Henry Scheffler, Record, p. 112.) A pocketbook containing One Hundred and Ninety Dollars ($190.00) in currency was also found on the person of Arthur Musica. When questioned about that, he said that it belonged to him. The judgment below recognizes his ownership of this latter amount; the receiver does not contest that.

Subsequently, Arthur Musica was summoned as a witness before the referee in bankruptcy. The testimony given on that occasion in the presence of Henry L. Lazarus, his counsel, and a member of the firm of Lazarus, Michel & Lazarus, intervenors, will be found in the record at page 177.

Arthur Musica had been schooled too well in constitutional rights and privileges. When asked for the name of his mother, he declined to answer on the ground that it might tend to incriminate him. When asked concerning the Fifty-Six Thousand Dollars ($56,000.00) in currency found concealed on his person, he declined to state whether or not he claimed title to the money, on the ground that it might tend to incriminate him. He would not say it belonged to him; he would not say it did not belong to him; he refused to give any explanation whatever concerning it. The evidence shows, however, that he was a boy working around his father's store; that he started out at One Dollar and Seventy-Five Cents ($1.75) per week and worked up to Twelve Dollars ($12) per week, and that in addition to this remuneration he was permitted to charge on his father's bill wearing apparel bought at Rogers, Peet & Co.'s store.

In view of his original statement above referred to, and in the face of his subsequent flat refusal on his part to give any explanation as to how he came into possession of so large a sum of money as was found concealed on his person at the time of his arrest, it is but reasonable to conclude that the statement which he made at the time of his arrest—to the effect that the money belonged to his father—was and is correct.

Subsequently, however, this same Arthur Musica swore and subscribed to an affidavit (Record, p. 184) in which he admits that he had or has no title to the money; consents that it may be turned over to the receiver of A. Musica & Son, and declares that the money was given to him for safekeeping on the morning of his arrest, by his brother, Philip Musica, one of the bankrupts. It will be remembered that Philip is the older brother and partner of Antonio Musica, the father, doing business under the firm name of A. Musica & Son.

With respect to the claims of Lucy Grace and Arthur Musica, and of Lazarus, Michel & Lazarus, intervenors, as assignee of Lucy Grace and Arthur Musica, under assignments dated and executed after the filing of the petition in involuntary bankruptcy and after, or on the same day that the ancillary proceedings were filed in the Eastern District of Louisiana, the Circuit Court of Appeals said:

> "The sworn admissions of Lucy Grace and Arthur Musica, and other evidence, left no doubt that the property in question was the property of the bankrupt estate. The parties defendant to these petitions had and asserted no just adverse

> claim to the fund that would entitle them to test their rights in a plenary suit against them. In such cases the jurisdiction of the Bankruptcy Court may be exercised against the persons so holding assets of the bankrupt estate in a summary way by petition and without plenary suit. Mueller vs. Nugent, 184 United States 1, 18."
>
> See also opinion of the Judge of the District Court, Record, p. 270.

In view of the facts as they appear from the record and as they have been found by both the District Court and the Circuit Court of Appeals, it is manifest that the claim of the intervenors is wholly unfounded in law and is utterly without support in principle and reason. We may conclusively assume, as has been found by both the District Court and the Circuit Court of Appeals, that the property taken from the fugitives, including not only that taken from the bankrupts themselves, but also from Lucy Grace and Arthur Musica, belonged to the bankrupts.

The very day that this money was taken from the fugitives, namely, March 19, 1913, the petition in involuntary bankruptcy was filed in the Southern District of New York. By the filing of this petition the property of the bankrupts vested in **custodio legis** and the bankrupts became powerless to deal with this property or create any claim or right there against in favor of anyone whomsoever. Three days after the petition in bankruptcy was filed, Lucy Grace Musica and Arthur Musica executed assignments in favor of Lazarus, Michel & Lazarus against that part of the fund taken from their re-

spective persons. Lucy Grace Musica and Arthur Musica had no claim to this money; it was the property of the bankrupts, and Lucy Grace and Arthur Musica have so admitted. Hence, it was not possible for Lucy Grace and Arthur Musica, holding this property merely as agents for the bankrupts (the property itself at the time of the assignment being in the New Orleans National Bank) to assign to Lazarus, Michel & Lazarus any part of this property, which they did not own, or to create any right or lien upon this property in favor of Lazarus, Michel & Lazarus.

It was suggested in argument below that Lazarus, Michel & Lazarus are entitled to the application of the rule of the "purchaser in good faith." This suggestion seems to be so absurd as not to require discussion. When a lot of fugitives, travelling under assumed names to avoid detection, are apprehended as they are about to leave the country, and when the fruit of their frauds is found concealed upon their persons, the counsel employed to resist extradition will not be heard to say, in accepting an assignment of a portion of this concealed property, that he believed that the money and property belonged to the fugitives and that he was therefore acting in good faith and should be awarded the property covered by the assignment as against the lawful owners. It takes some ingenuous mental or legal process to arrive at this conclusion; the most available doctrine to give color to any such theory is the rule of the purchaser in good faith. It is not suggested in what particular the counsel was a purchaser; it is not suggested what formed the basis of the sale; it is not suggested with what prop-

erty or value the counsel parted in an honest belief and reliance upon the assignor's ownership of and interest in the fund. Yet it is asserted that the counsel is entitled to the application of the rule of the purchaser in good faith.

The intervenors also urges that the District Court was without jurisdiction or authority to compel the summary surrender by the bankrupts and their agents of this property and money, but that the receivers should have been required to institute a plenary suit. This contention has been disposed of by the decision of this Court in **Mueller vs. Nugent, 184 United States, 1.** Upon this point the Circuit Court of Appeals said:

> "The parties defendant to these petitions had and asserted no just adverse claims to the fund that would entitle them to test their rights in a plenary suit against them. In such cases the jurisdiction of the Bankruptcy Court may be exercised against persons so holding assets of the bankrupt estate in a summary way by petition and without plenary suit. **Mueller vs. Nugent, 184 United States, 1.**

II.

Although the petition of intervention of Lazarus, Michel & Lazarus declares specifically upon the assignments in favor of said intervenor, made by the bankrupts, Antonio and Philip Musica and by Lucy Grace and Arthur Musica, all dated and executed subsequent to the bankruptcy, nevertheless it was argued in the

Circuit Court of Appeals that, irrespective of the assignments, counsel were entitled to compensation under the Bankruptcy Act, and that it was competent for the bankrupts and their agents to create a charge upon this property by assignment in order to enable them to employ counsel in the protection of their rights. We have seen that, from the moment of the filing of the petition in bankruptcy, the property of the bankrupts, whether in their possession or in the possession of their agents, is placed by operation of law in the custody and control of the Bankruptcy Court, and from that moment the bankrupts are without power or authority to create any right or charge upon the property. The law makes no exception in favor of a charge created in favor of counsel for professional services to be rendered. Even if the intervenor in its petition of intervention, has not restricted its claim to relief under the assignments, the intervenor, as counsel, would not be entitled to a fee under the bankruptcy statute.

Upon this subject the Circuit Court of Appeals said:

> "It is equally clear that A. Musica & Son and the members of that firm, after the beginning of the proceedings in bankruptcy, could neither directly or indirectly create any charge on their assets in favor of the intervenor for services to be rendered them in the City and State Courts. Provision is made by the Bankruptcy Act, Section 64, B. 3, for one reasonable attorney's fee for services rendered the bankrupt in involuntary cases 'while performing the duties herein prescribed.' We do not understand the intervening petition as asserting a claim under the provisions

> of the bankruptcy law; and, besides, if such claim is asserted, it must be decided by the New York Bankruptcy Court having jurisdiction of the administration of the bankrupt's estate." **In re Wood & Henderson, 210 United States, 246.**

The Court below sustained the right of the receiver to recover the money and property which were proved to belong to the bankrupts, and dismissed the intervening petition of Lazarus, Michel & Lazarus, reserving to them the right to assert whatever claim they have as counsel fees in the Bankruptcy Court of primary jurisdiction.

In **Collier on Bankruptcy, Eighth Edition**, page 691, it is said in discussing the allowance of attorney's fees in involuntary cases:

> "Here the statute limits compensation to services rendered to the bankrupt while performing the duties put on him by the act. There has been some discussion as to the meaning of the words. Where there are separate attorneys for different partnership bankrupts, but one allowance should be made. The test seems to be: Did the performance of the prescribed duties materially benefit or hasten the administration of the estate; and, if so, were the services of the bankrupt's attorneys both necessary and instrumental to either of those ends? The bankrupt's attorneys may not be allowed for services rendered in defending a suit by the trustee to compel the bankrupt to turn over assets."

Numerous authorities are cited by Collier in support of the declaration of the text. See also **In re Fullick, 201 Federal, 463; Duran Mercantile Company, 199 Federal, 961; In re Fogarty, 187 Federal, 773.**

Notwithstanding the intervening petition is based solely upon the assignments, the intervenors did, in oral argument in the Circuit Court of Appeals, seek to obtain relief upon the ground that their services were engaged by the Musicas to protect the fund and resist its being taken from them, and that, therefore, the Musicas had a right to charge and impress this fund with a claim in favor of counsel employed for the purpose aforesaid, and that their right to use the fund in payment of counsel to protect them in their personal and property rights was safeguarded by the provisions of the Constitution of the United States. The measure of this contention is that a thief, caught while purloining and carrying away property, is entitled to charge the property with a lien in favor of counsel whom he employs to defend him in the criminal proceedings, and to resist the restitution of the property to its true owner. This theory is not only specious, but is absolutely frivolous.

In **Gillespie vs. Piles & Co., 178 Fed., 886**, the Circuit Court of Appeals for the Eighth Circuit said:

> "A Court of equity and a Court of Bankruptcy is a Court of equity, may not take out of a fund or property in its custody and pay compensation for the services of an attorney or of any other party rendered to recover or retain the fund or property from its equitable owner.
>
> "It is only when such services have had the effect to recover or preserve the property for its true owner that a Court may pay compensation therefor out of the property. Services injurious to the rightful owner may not be thus compensated at his expense.

III.

Finally, it is asserted by the intervenor that the money and property were taken from the respective persons of the Musicas, and that as a result the said money and property are immune from seizure, and that under the Constitution of the United States the prisoners were entitled to have the money returned to them.

The constitutional right to protection against unreasonable searches and seizures is invoked and an array of authorities on constitutional law are brought before us. We are told that the citizen is immune from unreasonable searches and seizure; that his person is inviolate; that money and property wrongfully taken from his person cannot be subjected to civil process.

We have always heard that the Constitution was a shield and not a "fence." We have never been taught that the Constitution was an instrument which a thief might use in retaining control of his loot. We do not understand that, because stolen property is found on the person of a thief, the owner is prevented from recovering possession of that property. We know of no law, or reason, which ordains that stolen property should be turned back to a thief to the end that the true and lawful owner may be completely victimized and defrauded, even though the thief have the laudable purpose of using all or any part of the money to pay the fees of counsel. We understand that imprisonment for debt is abolished. We understand that, for the purpose of aiding in the enforcement of civil process, the citizen can

not colorably be thrown into jail and submitted to the indignity of search. We understand that the law which protects the citizen against such action in his person and property will not permit the property so unlawfully taken from the person of the citizen to be subjected to civil process and seizure.

But, in this case we have a totally different state of facts. Here the thieves were caught "redhanded," so to speak. This case is entitled to a conspicuous place in modern criminal annals. Nearly one million dollars was stolen from the banks and bankers in the City of New York by fraudulent practices of A. Musica & Son, Antonio Musica and Philip Musica. When the frauds had been discovered and arrest was imminent, the Musicas fled with One Hundred Thousand Dollars ($100,000.00) —all that remained of the loot; or at least all that remained in this country. The whole family was party to the fraud; all were assisting in concealing it and in making the escape of the entire party. The young woman and the young man from whose persons the greater part of the money was taken were like the others, travelling under assumed names; the girl was passing as her brother's wife, occupying the same berth and stateroom and the same room in the hotel.

Upon this point the Circuit Court of Appeals said:

> "The money and securities were found by search in the possession of Antonio, Philip, Arthur and Lucy Grace Musica. The first three were arrested in New Orleans as fugitives from justice, and the last named was arrested and held as a

material witness. The property was first delivered by the city police to the Judge of the First City Criminal Court, in which the proceedings were pending, and by direction of that Court were placed in a bank in New Orleans. Subsequently, the City Criminal Court directed that the property be held subject to the order of the Bankruptcy Court, so there is no question of conflict of jurisdiction in the case before us. Much has been said in argument about the alleged illegal arrest and search of the Musicas and the alleged illegal seizure of the property, but no questions involving such allegations are material, or necessary to be considered, in the decision of the case presented to us by the record."

It would indeed be a novel proposition of law that, where parties under indictment under a charge of larceny in one State, are arrested in good faith in another State, and are held for extradition under an affidavit charging them with being fugitives from justice, the money and property found upon their persons must be returned to them and are not subject to levy or seizure on the part of their creditors or to administration in a Bankruptcy Court. This situation applies to three of the Musicas, and the same principle applies to Lucy Grace Musica, who was arrested while travelling under an assumed name and assisting the fugitives in their flight. She was held as a material witness in order to establish the identity of the parties and the fact that they were fugitives and had recently been in the State of New York. But, even though the property taken from a fugi-

tive be protected from seizure by the Constitution of the United States, it would seem that this protection must be invoked by the person himself and cannot be invoked by his assignee.

In view of these facts and circumstances, is it possible that the Constitution of the United States can be availed of to prevent the restitution of this property taken from the persons of the fugitives? Can it be said that the parties were illegally arrested and that the purpose of the arrest was to enforce civil process? The four men were charged with being fugitives from justice; the two women, travelling with the men under assumed names, aiding in the deception, assisting in making away with the loot, accomplices in every reasonable sense, were charged as being material witnesses for the purpose of establishing the identity of the party. The men fought extradition; applied to the Federal Court for writs of **habeas corpus** to prevent their return to New York; finally, abandoned the fight and returned under the Governor's warrant of rendition. The charges against the woman were dropped; they were no longer needed as material witnesses to prove the identity of the fugitives and the other facts made necessary by the extradition statutes.

The Court below, in its opinion (Record, p. 270), held that it would be trifling in the extreme to require the actual custody of the money and property to be returned to the bankrupts and then to require them to surrender it to the Court on pain of punishment for contempt.

We go further than the Court below and say that the bankrupt law is impotent if money taken from the person of thieves and their accomplices (money that rightfully belongs to a lot of victimized creditors) must be returned to the thieves that they might have the opportunity of making away with it, and not only complete the fraud but obtain the full measure of benefit therefrom.

The constitutional right against search and seizure, it must here be remembered, is not urged by Lucy Grace Musica and Arthur Musica, themselves. They seem to have repented and, in their affidavits to be found in the record (which may be taken as admissions against interest) they have asserted that they have no title or claim to the money and property, except in certain minor particulars unnecessary to consider; and they have consented that the money and property may be turned over to the receiver in bankruptcy. Lucy Grace Musica and Arthur Musica are, therefore, not before the Court asserting their constitutional rights. The right of the citizen against unreasonable searches and seizures is being asserted not by the citizen, but by the citizen's assignee, Lazarus, Michel & Lazarus. We have always understood that those amendments to the Constitution of the United States forming what is generally known as the "Bill of Rights" are the paladium of personal liberty, enacted for the protection of the citizen, himself, and not for his assignee. When the citizen refuses to claim his constitutional right, we do not understand that his

assignee may claim it for him. Lucy Grace Musica and Arthur Musica are satisfied that the money should go where it rightfully belongs, irrespective of the manner in which it was taken from their persons. Lazarus, Michel & Lazarus, as the assignee of Lucy Grace Musica and Arthur Musica, will not be heard to urge, in support of their assignment, the constitutional rights and privileges of their assignors; rights and privileges which, if they exist at all, are personal to the assignors themselves.

SUMMARY.

First. The motion to dismiss should prevail because the remedy for review of the decision of the District Court was solely by petition for review in the Circuit Court of Appeals under the bankruptcy law; there was no jurisdiction on appeal under the Circuit Court of Appeal Act, now the Judicial Code.

Second. In default of the motion to dismiss prevailing, the decree of the Circuit Court of Appeals should be forthwith affirmed, because:

(a) It is manifest that the property of the bankrupts cannot be dealt with as transferred and assigned after the bankruptcy by the bankrupts themselves or their agents.

(b) Property taken from the persons of the bankrupts and their agents, where they have committed crime and are arrested in flight, may be recovered by the receiver, and the restriction of such property cannot be demanded by the bankrupts or their agents against the demands of the receiver simply because the property was discovered in the search of prisoners.

Respectfully submitted,

EDWIN T. RICE,

H. GENERES DUFOUR,

Counsel for Receiver, Appellee.

APPENDIX.

"IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

"Fifth Circuit.

No. 2541.

"Antonio Musica et al.,
"Appellants,

"versus

"Ezra P. Prentice, Ancillary Receiver of A. Musica "& Son, et al.,
"Appellees.

"Appeal From the District Court of the United "States for the Eastern District of "Louisiana.

"Henry L. Lazarus, Eldon Lazarus and David Sessler (Herman Michel on the brief) for appellants.

"William C. Dufour, H. Generes Dufour and Gustave Lemle (George Janvier on the brief) for appellees.

"Before Pardee and Shelby, Circuit Judges, and Grubb, District Judge.

"Memorandum Opinion by Direction of the Court. By Shelby, Circuit Judge:

"This litigation involves four separate proceedings by petition in the Bankruptcy Court and two interventions by claimants of a fund in Court.

The subject of the controversy is a large sum of money—about $75,000—and some notes, mortgages and insurance policies amounting in value to probably $50,000. The money and securities were found by search in the possession of Antonio, Philip, Arthur and Lucy Grace Musica. The first three were arrested in New Orleans as fugitives from justice, and the last named was arrested and held as a material witness. The property was first delivered by the city police to the Judge of the First City Criminal Court, in which the proceedings were pending, and, by direction of the Court, were placed in a bank in New Orleans. Subsequently the City Criminal Court directed that the property be held subject to the order of the Bankruptcy Court. So there is no question of conflict of jurisdiction in the case before us.

"Much has been said in argument about the alleged illegal arrest and search of the Musicas and the alleged illegal seizure of the property, but no questions involving such allegations are material, or necessary to be considered, in the decision of the case presented to us by the record.

"Antonio Musica and Philip Musica were partners in trade under the firm name of A. Musica & Son. All of the property in question, with the exception of about $2500, was the property of A. Musica & Son. No objection is made as to the disposition by the Court below of the part of the fund not belonging to the bankrupt firm. On the same day of the arrest of the Musicas in New Orleans—March 19, 1913—a petition in involuntary bankruptcy was filed in the District Court of the United States for the Southern District of New York against the firm of A. Musica & Son and the individual members of the firm, and on the

next day Ezra P. Prentice was by that Court appointed receiver of the bankrupt partnership, which partnership and the members thereof were duly adjudicated bankrupts. Prentice, as such receiver, appeared by counsel in the Court below and prayed to be confirmed as receiver, and, later, filed the four petitions, one against each of the Musicas, to which petitions the custodians of the property were also made parties, seeking in this summary way to recover possession of the money and securities.

"The Court below had ancillary jurisdiction of the proceedings, if not under the bankruptcy law, as originally enacted, certainly by virtue of the amendment of June 25, 1910, which authorizes courts of bankruptcy to 'exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.' **36 Stat. 838.**

"The sworn admissions of Lucy Grace Musica and Arthur Musica and the other evidence left no doubt that the property in question was the property of the bankrupt estate. The parties defendant to these petitions had and asserted no just adverse claim to the fund that would entitle them to test their rights in a plenary suit against them. In such cases the jurisdiction of the Bankruptcy Court may be exercised against persons so holding assets of the bankrupt estate in a summary way by petition and without plenary suit. **Mueller v. Nugent, 184 U. S. 1, 18.**

"An intervening petition of Adams & Generelly was disposed of by the Court below in a manner that seems satisfactory to all parties, and it requires no further notice.

"On April 28, 1913, the law firm of Lazarus, Michel & Lazarus filed in the Court below an intervening petition claiming $15,000 attorney's fees for services for represetning the Musicas in their defense against the proceedings against them in the City of New Orleans and in the Courts of Louisiana to protect their property rights and possession, and for representing them against proceedings in New York if their services were there required. The evidence shows the rendition of valuable legal services by the intervenors to the Musicas. It contains written contracts and assignments, showing that the compensation was agreed on by the Musicas, as alleged by the intervenors. All of these agreements were made and the professional services rendered after the petition in bankruptcy had been filed against the firm of A. Musica & Son. It seems clear that, as the money and security are the property of the bankrupts, the other members of the Musica family could create no charge on the property in favor of the intervenors. It is equally clear that A. Musica & Son and the members of that firm, after the beginning of the proceedings in bankruptcy, could neither directly nor indirectly creat any charge on their assets in favor of the intervenors for services to be rendered them in the city and State courts. Provision is made by the Bankruptcy Act, Section 64, b. 3, for one reasonable attorney's fee for services rendered the bankrupt in involuntary cases 'while performing the duties herein prescribed.' We do not understand the intervening petition as asserting a claim under the provisions of the bankruptcy law; and, besides, if such claim is asserted, it must be decided by the New York

Bankruptcy Court having jurisdiction of the administration of the bankrupt's estate. **In re Wood and Henderson, 210 U. S. 246.**

"The Court below sustained the right of the receiver to recover the money and securities which were proved to belong to the bankrupts, and dismissed the intervening petition of Lazarus, Michel & Lazarus, reserving to them the right to assert whatever claim they have as counsel fees in the Bankruptcy Court of primary jurisdiction.

"The decree of the Court below and the opinion of the District Judge—**203 Fed. 413**—conform to the views we have expressed.

"Affirmed."

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 1012.

ANTONIO MUSICA ET ALS.

versus

EZRA P. PRENTICE, RECEIVER OF A. MUSICA & SONS ET ALS., BANKRUPTS,
Appellee,

LAZARUS, MICHEL & LAZARUS,
Intervenor, Appellant.

Supplemental Brief in Support of the Motion to Dismiss or Affirm, Filed by Ezra P. Prentice, Receiver.

It will be observed that the cases of **Bryan v. Bernheimer, 181 U. S. 188; Muller v. Nugent, 184 U. S. 1,** and

Louisville Trust Co. v. Comingor, 184 U. S. 18, the two first mentioned being cited in original brief, were cases in which proceedings in bankruptcy were taken against the bankrupts or their agents to summarily turn over money or property. In each of these cases the review in this Court was by **certiorari** to the respective Circuit Courts of Appeals, and not by appeal.

In **Holden v. Stratton, 191 U. S. 115,** cited in the original brief, it was held that, notwithstanding the fact that an **appeal** had been taken to the Circuit Court of Appeals, it was competent for that Court to consider the case as if before it on petition for revision, citing **Bryan v. Bernheimer, 181 U. S. 188.**

In **Denver First Natl. Bank** v. King, 186 U. S. 205, this Court said:

> "Apart from Section 25, the Circuit Courts of Appeals have jurisdiction on petition to superintend and revise any matter of law in bankruptcy proceedings, and also jurisdiction of controversies over which they would have appellate jurisdiction in other cases. The decisions of these Courts might be reviewed here on **certiorari** or in certain cases by appeal under Section 6 of the Act of 1891. **Mueller v. Nugent, 184 U. S. 1; Huntington v. Sanders, 163 U. S. 317; Aztec Mining Co. v. Ripley, 151 U. S. 79-81.** But the question before us is whether this appeal was properly brought, and we do not think it was."

In **Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300,** cited by the Judge of the District Court in his opinion (R., 270), this Court said:

> "Whatever may be the limitations of the doctrine declared by this Court, speaking by the late Chief Justice Fuller in **Mueller v. Nugent, 184 U. S. 1, 14,** where it is said: 'It is as true of the present law (1898) as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction, **Bank v. Sherman, 101 U. S. 403;** and on adjudication, title to the bankrupt's property became vested in the trustee, 70, 21e, with actual or constructive possession, and placed in the custody of the Bankruptcy Court,'' it is none the less certain that an attachment of the bankrupt's property after the filing of the petition, and before adjudication, cannot operate to remove the bankrupt's estate from the jurisdiction of the Bankruptcy Court for the purpose of administration under the act of Congress. It is the purpose of the bankruptcy law, passed in pursuance of the power of Congress to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the Court, wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the Bankruptcy Court is so far **in rem**, that the estate is regarded as in **custodia legis** from the filing of the petition. It is true that under 70a of the Act of

1898 the trustee of the estate, on his appointment and qualification, is vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt, but there are many provisions of the law which show its purpose to hold the property of the bankrupt intact from the time of the filing of the petition, in order that it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings. Paragraph 5, 70a, in reciting the property which vests in the trustee, says there shall vest 'property which, prior to the filing of the petition, he (the bankrupt) could by any means have transferred or which might have been levied upon and sold under judicial process against him' (the bankrupt). Under 67c attachments within four months before the filing of the petition are dissolved by the adjudication in the event of the insolvency of the bankrupt, if its enforcement would work a preference.

"Provision is made for the prompt taking possession of the bankrupt's property before adjudication if necessary (69a). Every person is forbidden to receive any property after the filing of the petition, with intent to defeat the purposes of the act. These provisions, and others might be recited, to show the policy and purpose of the Bankruptcy Act to hold the estate in the custody of the Court for the benefit of creditors after the filing of the petition and until the question of adjudication is determined. To permit creditors to attach the bankrupt's property between the filing of the petition and the time of adjudication would be to encourage a race of diligence to defeat the purposes of the act and prevent the equal dis-

tribution of the estate among all creditors of the same class which is the policy of the law. The filing of the petition asserts the jurisdiction of the Federal Court, the issuing of its process brings the defendant into Court, the selection of the trustee is to follow upon the adjudication, and thereupon the estate belonging to the bankrupt, held by him, or for him, vests in the trustee. Pending the proceedings the law holds the property to abide the decision of the Court upon the question of adjudication as effectively as if an attachment had been issued, and prevents creditors from defeating the purposes of the law by bringing separate attachment suits which would virtually amount to preferences in favor of such creditors. See in this connection the well-considered cases of **State Bank v.Cox, 143 Fed. Rep. 91 C. C. App. of the Seventh Circuit; Board of County Commissioners v. Hurley, C. C. of Appeals of Eighth Circuit, 169 Fed. Rep. 92, 94.**"

Because of the foregoing authorities and for the reasons assigned in the original brief herein filed, we believe that the motion to dismiss should prevail, and, in default thereof, that the decree and judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

EDWIN T. RICE,

H. GENERES DUFOUR,

Counsel for Receiver, Appellee.

Supreme Court of the United States

No. 1012.

ANTONIO MUSICA, ET AL.,

versus

EDNA P. PRENTICE, RECEIVER OF A. MUSICA AND SON, ET AL.,

Appellee.

LAZARUS, MICHEL & LAZARUS, INTERVENOR,

Appellant.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Brief in Opposition to Motion to Dismiss or Affirm.

HENRY L. LAZARUS,
HERMAN MICHEL,
ELDON S. LAZARUS,
DAVID SESSLER,
Appellants in Propria Personis.

GIRAULT FARRAR,
Of Counsel.

May 4, 1914.

E. P. Andrés Ptg. Co., Brief Printers, 516 Natchez St.

CASES CITED BY APPELLANTS.

SUBJECT INDEX.

Acts of Congress, March 3, 1891, 26 Stat., at Large 828, Chap. 517, Sec. 6.
Judicial Code 1912, Sec. 128, Sec. 241.

3. No printed record having been submitted to appellants or to the Court, the motion to dismiss or affirm should be denied or be postponed until the regular hearing of this cause. 20-23

Authorities in support of this proposition: **Power vs. Baker, 112 U. S. 710; Crane Iron Co. vs. Hoagland, 108 U. S. 5; National Bank vs. Ins. Co., 100 U. S. 43; Waterville vs. Van Slyke, 115 U. S. 290.**

4. It is well settled that a motion to affirm coupled with a motion to dismiss, will not be entertained unless there is color of ground in the motion to dismiss. 24

Authorities in support of this proposition: **Chanute City vs. Trader, 132 U. S. 213;** and cases cited therein.

5. The question of jurisdiction in this case cannot be determined without opening the record and looking into the merits of the controversy, and hence the motion to dismiss should be denied or referred to the hearing on the merits. 24

Authorities in support of this proposition: **Lynch vs. De Bernal, 131 U. S. (Appendix) XCIV.**

6. That the questions raised are serious and not frivolous, see Assignment of Errors, p. 26.

Supreme Court of the United States

No. 1012.

ANTONIO MUSICA, ET AL.

versus

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Appellee.

LAZARUS, MICHEL & LAZARUS, INTERVENOR,

Appellant.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Brief in Opposition to Motion to Dismiss or Affirm.

Prentice, receiver, appellee herein, moves to dismiss the appeal of Lazarus, Michel & Lazarus, attorneys at law, intervenors and appellants herein, allowed by Hon.

Don A. Pardee, acting for the Circuit Court of Appeals for the Fifth Circuit, basing his motion to dismiss on the ground that the judgment and decree of said Circuit Court of Appeals are made final by the act of Congress, in a cause of this nature, and that this Court is without jurisdiction to review the same by appeal.

Prentice, receiver, has also moved, in the alternative, that said judgment and decree be affirmed on the ground that "it is manifest that the appeal was taken for delay, and that the questions, upon which the decision of said cause depends, are so frivolous as not to need further argument."

In passing ,we simply call attention to the fact that the counsel for the receiver then proceeds to gravely "argue" this frivolous appeal in a fifty-page brief.

No printed record of this cause **in this Court**, has been submitted by the appellee to counsel for appellants, or to this Court. The page references, given in this brief, are to the printed record filed in the Circuit Court of Appeals.

I.

THE MOTION TO DISMISS SHOULD BE DENIED: THIS COURT HAS JURISDICTION TO HEAR AND DETERMINE THE CAUSE OF THE APPELLANTS.

STATEMENT.

The proceedings of this litigation were begun in the District Court of the United States for the Eastern District of Louisiana, on March 22nd, 1913, upon the appli-

cation of Ezra P. Prentice, appearing solely through counsel, alleging that an involuntary petition in bankruptcy had been filed against A. Musica & Son and the individual members thereof, on March 19th, 1913, in the Southern District of New York, and that he had been appointed temporary receiver in said district. Thereupon, the District Judge forthwith confirmed said Prentice as "Temporary Receiver" for the Eastern District of Louisiana, with authority to take into his possession all the property of A. Musica & Son, situated within the District, etc. (Rec., p. 9.)

On April 1st, 1913, the said receiver filed in the District Court four separate summary rules or proceedings, against Antonio and Philip Musica, individual members of the alleged bankrupt firm, and against Lucy Grace Musica and Arthur Musica, alleging their arrest, and the search of their persons, the amounts of money and property taken from their bodies, upon their apprehension in New Orleans, by the police of the City of New Orleans, and the deposit by the police authorities of the same in the New Orleans National Bank, subject to the orders of the Judge of the First City Criminal Court of New Orleans. The receiver further referred in vague and general terms, to certain alleged frauds upon banks and other corporations, not named, and without setting out either the nature or character of the of the so called frauds referred to, finally alleged that the moneys so taken from the said prisoners, defendants in rule, belonged to the bankrupt firm of A. Musica & Son. (Rec., pp. 22-41.)

The District Judge in acting upon this summary proceeding, ordered each defendant, and also Hon. J. B. Fisher, Judge of the First City Criminal Court, of New Orleans, a State Court, and the New Orleans National Bank, to show cause why the moneys thus taken from the defendants, should not be **forthwith turned over to the receiver** and in the meantime enjoined and restrained the New Orleans National Bank, the special depository of the said Judge of the First City Criminal Court, from delivering or surrendering the said money and property to anyone.

On April 18th, 1913, the New Orleans National Bank answered, admitting its receipt of the fund and property as a special deposit; its issuance of the certificate of deposit to the order of Hon. John B. Fisher, Judge of the First City Criminal Court, and praying for an order to be permitted to deliver the fund as a whole, to one person, to be named by the Court, upon the surrender of its outstanding certificate. (Rec., pp. 44-58.)

On April 24th, 1913, Lucy Grace Musica, Arthur Musica, Antonio Musica and Philip Musica, in accordance with the rules of equity procedure No. 29, and in accordance with order No. XXXVII of the Bankruptcy Rules, moved to dismiss the summary proceedings of the receiver, taken against them, challenging the jurisdiction of the District Court, on various grounds. (Rec., pp. 62-69.)

This motion was overruled.

The four Musicas, defendants, following the Equity Practice, Rule No. 73, thereupon moved to dissolve the restraining order issued against the New Orleans National Bank, alleging that movers had been falsely arrested; without warrant of law; that their persons had been searched without warrant of law; that they had been stripped of all the money and property which they had in their personal possession, and that their said money and property were detained under the pretense of its use as evidence; that the order of the United States District Court made upon the Judge of the First City Criminal Court and upon his depository, the bank, was made for the purpose of wresting the property from the State Court, which property had been taken from movers by violence and in fraud of law; that the order of the District Court was null and void, and that its procedure was not only in excess of the jurisdictional powers of said District Court, but that it violated the constitutional rights of defendants, under Articles IV, V, VI and XIV, of the Amendments to the Constitution of the United States, which guarantee to them immunity from unlawful search and seizure of their persons, property and effects, and which further guarantee to them the right of assistance of counsel for their defense. (Rec., pp. 74-85.) These motions were likewise overruled by the Court.

Judge Fisher of the State Court made no appearance to the order issued by Judge Foster of the United States District Court, in the proceedings above referred to.

On April 28th, 1913, Lazarus, Michel & Lazarus, attorneys at law, appeared in the above proceedings, and filed **pro interesse suo**, their petition of equitable inter-

vention, formally protesting against the assumption of jurisdiction by the United States District Court, and prayed the Court for the recognition of the contractual assignments made to them by Lucy Grace Musica and Arthur Musica, in consideration of the professional services rendered and to be rendered to them, and to their father, sister and brothers, **payable out of the funds** then on deposit in the New Orleans National Bank, the custodian of the First City Criminal Court of New Orleans, which the four defendants had alleged had been taken from them by violence and fraud. (Rec., p. 186.)

In the supplemental petition of the intervenors, they prayed for recognition and enforcement of the assignments made to them by Antonio Musica and Philip Musica, the individual members of the alleged bankrupt firm of A. Musica & Son. Both original and supplemental petitions of intervenors alleged the performance of legal services to the respective defendants in both State and Federal Courts. Upon the trial of the intervention, the receiver excepted to the jurisdiction of the Court on the ground that third persons could not intervene, even if they had rights by assignment or otherwise. The receiver also denied the allegations of the petition of intervenors and specifically denied that Lucy Grace Musica and Arthur Musica had any title to the money or property found on their person. (Rec., p. 191.)

Upon the submission of the cause, the Court ordered the four defendants, the Musicas, and the New Orleans National Bank to turn over and deliver to the receiver all the money and property found on their respective

persons, and then on deposit in said bank, and directed this money and property to be transmitted to the trustee of A. Musica & Son, when elected.

In the decrees rendered against Philip, Antonio and Lucy Grace Musica, the Court dismissed the intervention of Lazarus, Michel & Lazarus, reserving their rights to assert whatever claim they might have in the Court of original and primary jurisdiction.

In the decree rendered against Arthur Musica, the Court recognized the intervention of Lazarus, Michel & Lazarus, but only to the extent of $189.00, and decreed payment of said amount with costs out of the fund, and again reserved their rights, if any, to claim counsel fees in the original bankruptcy proceeding. (Rec., pp. 274-282.)

On June 3rd, 1913 the intervenors filed their petition for rehearing, which was overruled. (Rec., p. 283.)

From the decree of the District Court the intervenors Lazarus, Michel & Lazarus, were granted an appeal with **supersedeas**, to the Circuit Court of Appeals, the effect of which was to retain, within the jurisdiction of the District Court of Louisiana, the sum of $15,000.00, claimed by intervenors to cover the assignments of that amount. (Rec., p. 256.)

The four defendants, the Musicas, were granted appeals without **supersedeas**.. (Rec., p. 292.)

The judgment of the District Court of the United States was in all respects affirmed by the Circuit Court of Appeals.

The four Musicas then applied for appeals to the Supreme Court of the United States without **supersedeas**, which were denied by the Circuit Court of Appeals.

The intervenors, Lazarus, Michel & Lazarus, were allowed their appeal with **supersedeas** by said Circuit Court of Appeals.

ARGUMENT.

The sole question presented on the motion to dismiss, is whether this Court has jurisdiction to hear and determine the appeal of Lazarus, Michel & Lazarus, the intervenors herein, who filed their independent petition of equitable intervention in the District Court, claiming property in the custody of the bankrupt Court, by virtue of assignments made to them by the defendants, out of the funds seized by the receiver. This appeal was taken under Section 24-a of the Bankrupt Act, which invests the Supreme Court of the United States and the Circuit Courts of Appeal with appellate jurisdiction, "of controversies arising in bankruptcy proceedings from the Courts of bankruptcy, from which they have appellate jurisdiction in other cases." This general appellate jurisdiction is defined in the **Acts of Congress, March 3rd, 1891, 26 Stat. L., 828, chap. 517, sec. 6.** That is to say, the "controversies" instituted by third persons, who intervene in pending bankruptcy proceedings by independent petition and suit, are unaffected by any provisions of the bankrupt law itself regulating appeals,

but are regulated wholly by the usual practice in Federal Courts, in similar cases in accordance with the Statutes of the United States conferring jurisdiction upon the appellate Courts.

Hence, appellants contend that the decree in this cause is not "final" under **Section 128 Judical Code, 1912,** and that an appeal lies in this cause under **Section 241 of said Judicial Code,** which section is but a re-enactment of the 26 Stat. L., 828, chap. 517, sec. 6.

Possession of the funds in controversy was taken by the United States District Court for the Eastern District of Louisiana, acting as an ancillary Court of bankruptcy. The assignments by the four defendants out of the funds, were made in said district. The intervenors who resided in the district, **rendered all their services in said district.** The independent suit of the intervenors was not based upon diversity of citizenship. Their claim was in the nature of an equitable intervention, praying for the recognition of certain assignments, made by each of the four defendants, out of the funds seized by the Court and about to be transmitted to a foreign jurisdiction, to-wit, to the Court of primary and original jurisdiction, in the then pending bankruptcy proceeding The intervenors' petition presented separate and distinct issues apart from the summary rule or proceedings of the receiver against the four defendants. To all intents and purposes, the intervenors were third parties, claiming property or rights and interests in property in the custody of the bankrupt Court, by means of assignment made to them out of the funds seized, in consideration of professional services rendered and to be rendered.

Such an intervention is, we submit, not a step in "bankruptcy proceedings," and can in no manner be likened or assimilated to "bankruptcy proceedings."

Bankruptcy proceedings, for purposes of appeal, are defined and illustrated in the bankruptcy act itself. They are judgments growing out of proceedings "adjudging or refusing to adjudge a defendant bankrupt," judgments "granting or denying a discharge," or judgments "allowing or rejecting a claim of five hundred dollars or over," and under the jurisprudence of the Federal Courts, there are numerous orders **ex parte** and interlocutory, made by the referee or district Judge, which after review by the Court of Appeals, are not appealable to this Court except in the manner specified by the bankruptcy act. But counsel for receiver is either confused in his own ideas, or is attempting to mislead the Court, when he argues and says that the petition of the intervenors in this cause attempts to change the original proceedings, from a "proceeding in bankruptcy" to a "controversy in bankruptcy." This is indeed a novel proposition, but it answers itself. The suits of third parties, who inaugurate and institute independent controversies, laying claim to possession of funds over which the bankrupt Court has assumed jurisdiction, certainly, do not thereby,—merely because they appear and file their suit in a bankrupt Court against the receiver or trustee,—have such separate suits metamorphosed into a bankruptcy proceeding or any other different kind of a proceeding, any more than the intervenor in any other proceeding changes the nature of the proceeding to which he intervenes. It is immaterial to

the intervenor what the nature of the proceedings are that are being litigated or adjudged in the bankruptcy Court. His rights are separate, distinct and independent from any pending proceedings or suits whatever their nature may be. The intervenor merely sets up and seeks to protect his own rights in the Court which has seized jurisdiction of the funds, and which funds are about to be transmitted to another jurisdiction.

But counsel for receiver lays down another novel test, as to the jurisdiction of this Court on appeal, and that is, whether the receiver's rights to administer the estate, or to take possession of the property or funds of a bankrupt, can be delayed or defeated by an intervention. Again counsel for the receiver seems confused in his ideas. Of course, all law suits are to a certain extent retarded by interventions and by appeals, but we must confess we have never heard of the argument **ab inconvenienti** being applied as a test of a Court's jurisdiction which is fixed by statute.

But again counsel for the receiver argues that the cases wherein appeals are allowed, have been only those in which the claims asserted have arisen **before** the bankruptcy proceedings, whereas the claim of intervenors in the case at bar admittedly arises **subsequent to the commencement** of involuntary proceedings. But is that a test of the Court's jurisdiction as to when a decree of the Circuit Court of Appeals is final for purposes of appeal to this Court, or has counsel here confused the motion to dismiss with the merits of the cause?

We submit that a large number of claims, both legal and equitable, can of necessity only arise after proceed-

ings in bankruptcy are begun. The case at bar is an excellent example. The defendants, the Musicas, were arrested in a strange city. They were stripped by the local police of every farthing of money and property found on their persons, and their funds were detained and deposited in Court, and they made assignments out of these funds to enable them to secure counsel to regain their liberty as well as to protect their rights of property. These assignments were made in New Orleans, La., **before adjudication**, but after the original petition in bankruptcy had been filed, to the Southern District of New York.

The right to pay attorney's fees in advance is recognized by the Bankrupt Act itself. There is only one limitation. The **quantum** is subject to re-examination by the trustee, or any creditor, as to the **reasonableness of the fee.**

Congress has specifically recognized the necessity of the right of the bankrupt to employ and pay for legal assistance, in his affairs, during the critical period of his insolvency. The only restraint upon this privilege is the requirement that such payment shall be reasonable in amount. In voluntary proceedings, the attorney may receive his fee before filing the petition. In involuntary proceedings, the alleged bankrupt does not need the services of the attorney until such proceedings are filed, and then he may pay for the services of his attorney to resist the adjudication or any other proceedings or rules that may be taken against him. The statute clearly in terms provides for both contingencies.

Furthermore, the Bankrupt Act originally conferred jurisdiction only upon the District Court of the district where the alleged bankrupt had his domicile, or where his principal place of business was located. Since the amendment of 1910, however, ancillary jursidction in aid of a receiver or trustee, has been granted to all of the United States District Courts, so that we now have Courts of original and primary jurisdiction and Courts of ancillary jurisdiction. The District Court in this cause, in the exercise of its alleged ancillary jurisdiction, seized possession of the large fund in controversy. The attorneys, Lazarus, Michel and Lazarus, intervenors, had been employed by the two alleged bankrupts and by the third parties, other defendants, to protect their several rights after the arrest and apprehension of said defendants and after the seizure of their property, and also to represent them in the proceedings taken by the receiver in the District Court for the Eastern District of Louisiana.

The question then squarely arises, whether the District Court exercising ancillary jurisdiction, under the recent amendment of 1910 of the Bankrupt Act, Section 20, has the power to adjudge claims of the attorneys, alleging legal or equitable rights upon a fund over which the ancillary Court has taken jurisdiction, and whether, sitting as a Court of Equity, it has the right to enforce the assignments made by the two alleged bankrupts and the two third parties, not alleged bankrupts, for professional services rendered in the district of ancillary jurisdiction.

Furthermore, the two alleged bankrupts found themselves utter strangers in the City of New Orleans, and were incarcerated under serious criminal charges, and were violently and in fraud of law, stripped of all their means, by the unlawful search of their persons, and the unreasonable seizure of all of their property, without warrant, by the local police. Both under the letter of the Constitution of Louisiana and of the United States, they were, then and there, as a matter of right, entitled to have the assistance of counsel. This constitutional right necessarily implies the privilege to employ and, with means at their command, to pay counsel. Alleged bankrupts are certainly not made exceptions to this beneficent recognition of privilege by the Constitution of the United States or the jurisprudence of the Federal Courts.

Finally, counsel for the receiver attempts to justify his motion to dismiss with the observation that he has satisfied himself that the question is "**RES NOVA,**" but a glance at the authorities decided and settled by this Court, as ,well as the bare reading of the statute of the United States, will satisfy your Honors that the motion to dismiss in this cause is unfounded.

We submit the following authorities as decisive of intervenors' right of appeal to this Court, and of the jurisdiction of this Court to hear the same.

In Houghton, Receiver, v. Burden, 228 U. S., 161, Mr. **Justice Lurton**, in delivering the opinion of the Court, said:

> "This is an appeal from a decree, determining a controversy, arising in a bankruptcy proceeding. The origin of the matter was this: Canfield, the

bankrupt, was a merchant in New York. He borrowed from Burden the sum of $10,000.00, and as security **assigned** to him **certain book accounts,** aggregating the sum of $14,000.00 and agreed to act as agent for Burden in their collection. Shortly afterwards he was adjudicated a bankrupt. The receiver obtained possession of the bankrupt's books and held on to the assigned accounts and proceeded to collect them upon the claim that the contract was usurious and void under the law of New York.

"In this situation Burden **intervened** in the bankruptcy case and filed a petition in which he asserted his title to the assigned accounts and to any proceeds collected by the receiver. The District Court upon a final hearing, upheld the contention of the bankrupt's receiver, now the trustee, and dismissed the intervening petition. This decree was reversed by the Circuit Court of Appeals, that Court holding that the defense of usury had not been satisfactorily made out. * * *

"Such an intervention for the purpose of asserting title or claim to property in the possession of the bankrupt's trustee is an intervention in equity and a decree is reviewable by appeal to the Circuit Court of Appeals in the exercise of its general appellate powers in equity cases under Section 24-a of the Bankruptcy Act. **Loveland on Bankruptcy, 4 Ed., Sections 826 to 829; Hewitt v. Berlin Machine Works, 194 U. S., 296, 300; Knapp v. Milwaukee Trust Co., 216 U. S., 545.** Upon such an appeal the law and the facts are open for reconsideration, and from the decree of the Circuit Court of Appeals, **it not being final,** (Sec. 128, New Judicial Code) an appeal may be taken under Section 241 of the same Code.

"Being an appeal from a decree in a controversy arising in a bankruptcy proceeding, and therefore, an appeal under Section 24 a, and not under Section 25-b, General Order XXXVI, made under the latter Section and requiring a finding of facts, has no application, and the appeal opens up the whole case as in other equity cases. **Hewitt v. Berlin Machine Works**, supra; **Coder v. Arts**, 213 U. S., 223; and **Knapp v. Milwaukee Trust Co.**, supra."

In **Greey, Trustee, v. Dockendorff**, decided December 15th, 1913, Adv. Opinions, Sup. Ct., p. 166, **Mr. Justice Holmes**, in delivering the opinion of the Court, said:

"This was a petition by the appellee Dockendorff, filed in the bankruptcy proceedings against the bankrupt, the Schwab-Kenner Company, to have paid over to him the proceeds of accounts receivable alleged to have been assigned to him by the bankrupt. The defenses set up were that the assignment was a preference, and that it was made without present consideration with intent to defraud creditors of the bankrupt concern. The case was referred to a special master, who found that it did not appear that either the petitioner or the bankrupt knew that the latter was insolvent at the time of the supposed preference, or that there were any transfers with intent to defraud creditors, and found for the petitioner. His finding of facts and conclusions were concurred in by the District Court and Circuit Court of Appeals. * * * On the other side it is argued that this is not a controversy arising in bankruptcy proceedings within Section 24 of the Bankruptcy Act.

and that therefore the appeal should not have been allowed. This contention, if open, seems to be answered sufficiently by **Knapp v. Milwaukee Trust Company**, 216 U. S., 545."

In **Knapp v. Milwaukee Trust Co.**, 216 U. S., 545, Mr. Justice Day, in delivering the opinion of the Court, said:

"The Standard Telephone & Electric Company, a Wisconsin corporation, was adjudicated a bankrupt in the District Court of the United States for the Eastern District of Wisconsin. * * * The trustee in bankruptcy filed a petition to sell all the property of the bankrupt. Appellant, Knapp, as trustee of certain mortgages, given by the Telephone Company, intervened, and asked to have the lien of the mortgage established as the first lien on the property, and satisfied out of the proceeds of the sale. The property was sold, and the question is as to the lien of these mortgages upon the fund.

"The trustee in bankruptcy answered the petition of Knapp, trustee under the mortgage, averring that it was a chattel mortgage, and fraudulent and void as to creditors, because of certain agreements contained therein, because it was on after acquired property, and because of the failure to file an affidavit of renewal as required by the Wisconsin statute. * * *

"The Circuit Court of Appeals of the Seventh Circuit, upon appeal, affirmed the decree of the District Court, holding the mortgage void for the reasons set forth at large in the opinion of the District Judge.

"A motion has been filed to dismiss the appeal for want of findings of fact and conclusions of law in the Circuit Court of Appeals, as required by General Order in Bankruptcy XXXVI. * * *

"The case at bar is not of that class; it is an intervention in a bankruptcy proceeding, and, within the meaning of the act, a controversy arising in a bankruptcy proceeding, and the appellate jurisdiction is the same as in like cases under the Court of Appeals Act. Bankruptcy Act, Sec. 24-a; **Hewitt v. Berlin Machine Works, 194 U. S., 296; Coder v. Arts, 213 U. S., 223,** and cases therein cited."

In **Hewitt v. Berlin Machine Works, 194 U. S., 296, 300, Mr. Chief Justice Fuller,** in delivering the opinion of the Court, said:

"And as the Berlin Machine Works asserted title to the property in the possession of the trustee, by an intervention raising a distinct and separable issue, the controversy may be treated as one of those 'controversies arising in bankruptcy proceedings' over which the Circuit Court of Appeals could, under Section 24-a, exercise appellate jurisdiction as in other cases. Section 25-a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required. **Holden v. Stratton, supra.** While Section 24-a relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy Court of the jurisdiction, vested in them at law and in equity by Section 2, to settle the estates of bank-

rupts and to determine controversies in relation thereto. **Hutchinson v. Otis, 190 U. S., 552; Burleigh v. Foreman, 125 Fed. Rep., 217.**

"The appeal to this Court then followed under Sec. 6 of the Act of March 3rd, 1891."

Having shown that the unbroken and unqualified line of decisions of this Court, interpreting the statutes relating to bankruptcy and the statutes at large, on the jurisdiction of this Court, unquestionably allow the intervenors an appeal in this cause, we shall now direct the Court's attention to the motion to affirm the judgment of the Circuit Court of Appeals, the appellee alleging that the appeal was taken for delay, and further that the questions upon which the decision of said cause depends, are so **frivolous** as not to need further argument.

Had the contentions now in these motions pressed for consideration upon this Court been often or even once hitherto made before this Court in similar cases, and as often or even **once decided** adversely to appellants by this Court, so that appellee could thus point to a long or a short line of decisions showing that the rule has been now settled by some former adjudication of this Court, and has now become **stare decisis**, the appellee might well claim that there is **color for the motion to dismiss.** But, a search of the brief of counsel for appellee (which by the way does not comply with rule requiring an alphabetical list of cases on the fly leaf of the brief, discloses

not even **one**, much less a line of decisions upon the questions involved. Nor could there hardly be, for the obvious reason that the amendment, (Sec. 20 of the Bankrupt Act) giving the District Courts power to exercise ancillary jurisdiction, within their respective territorial limits, in aid of a Receiver or a Trustee, was enacted only in the year **1910**, and but few cases under that Act have, as yet, found their way to this Court. Indeed, learned counsel, with true Hibernian naivete, here openly confess that the matter, as they phrase it is **res nova.** That is to say they admit their own contention is, to say the least, disingenuous, if not frivolous.

II.

NO PRINTED RECORD IN THIS CAUSE HAVING BEEN SUBMITTED TO APPELLANTS OR TO THE COURT, THE MOTIONS TO DISMISS OR AFFIRM SHOULD BE DENIED OR POSTPONED UNTIL THE REGULAR HEARING OF THIS CAUSE.

The decision of the Circuit Court of Appeals was rendered **February, 1914.** The appeal of intervenors was allowed by said Court **March 11th, 1914,** and the transcript was, in due time, lodged and filed with the Clerk of this Court.

On **April 11th, 1914,** notice of the present motion to dismiss was served upon intervenors, but no **printed record of this Court** in this cause has been presented to them up to the time of going to press with this brief.

It is the settled practice of this Court for the moving party to **print the transcript,** before submission of the motion to dismiss or affirm, to the opposing counsel, and to the Court, or at least so much of the record as to enable this Court to act understandingly and intelligently. This has not been done in this case.

In **Power vs. Baker, 112 U. S., 710, Mr. Chief Justice Waite,** in delivering the opinion of the Court, said:

> "In this connection we take occasion to say, that motions of this kind, made before the record is printed, must be accompanied by a statement of the facts on which they rest, agreed to by the parties, or supported by **printed copies** of so much of the record as will enable us to act understandingly, **without reference to the transcript on file.**"

In **Crane Iron Co. vs. Hoagland, 108 U. S., p. 5-6, Mr. Chief Justice Waite,** in delivering the opinion of the Court, said:

> "These are writs of error to the Supreme Court of New Jersey, and the motions to dismiss are made because, as is claimed, no federal question is involved. The **records have not been printed,** and on these motions we can look only to the state-

ments of counsel as they appear in the briefs. The assignment of errors has been printed in the brief for the defendant, and the second and fifth assignments clearly present questions of which we have jurisdiction. Whether the errors thus assigned appear in the record, we cannot on these motions, as they are now presented, finally determine, but in the absence of any showing to the contrary, we will presume they do. The motions to dismiss must therefore be overruled.

"The questions involved are not of a character that we are inclined to consider on a motion to affirm, especially **before the record is printed.**

"It will be time enough to consider the objections to the assignment of errors **when the cases come on for hearing.**"

In **National Bank vs. Insurance Company, 100 U. S. 43,** Mr. **Chief Justice Waite,** in delivering the opinion of the Court, said:

"The further consideration of this motion is postponed until the case is heard on the merits. **The record has not been printed,** and counsel do not agree as to what it contains. We will not decide motions to dismiss before the record is printed, when there is any question about the facts on which the motion rests. In order to get a decision before printing, the motion papers must present the case in a way which will enable us to act understandingly without referring to the transcript on file."

In **Waterville vs. Van Slyke, 115 U. S. 290,** the Court said:

> "**The record has not been printed,** and in **National Bank vs. Insurance Co., 100 U. S. 43,** we announced the rule that to get a decision on a motion to dismiss before printing, the motion papers must present the case in a way which will enable us to act understandingly without referring to the transcript on file. * * * In fact, there is nothing on which we can act unless we go to the transcript.
>
> "The further consideration of the motion is consequently postponed until the case is for hearing on its merits."

Having established in our discussion of the motion to dismiss, that intervenors, under the Statutes of the United States and under the jurisprudence of this Court, have an undoubted right of appeal to this Court, we now respectfully submit that since no printed record of this cause has been submitted or filed by the appellee in support of their motion to dismiss or affirm, the appellants are clearly entitled to a postponement of the consideration of the motion to affirm to the hearing on the merits, and to be allowed the privilege of oral argument on the whole case.

III.

Furthermore, it is settled that a motion to **affirm** when coupled with a motion to dismiss, as here, will not be entertained unless there is **color** of ground in the motion to **dismiss.** In **Chanute City vs. Trader, 132 U. S.**, at p. **213,** this Court said:

> "The practice of not entertaining a motion to affirm unless there is some **color** of right to a dismissal has since been frequently sustained by this Court. **Hinckley vs. Morton, 103 U. S. 764; School District of Ackley vs. Hall, 106 U. S. 428; Davies vs. Corbin, 113 U. S. 687; Walston vs. Nevin, 128 U. S. 578; New Orleans vs. Construction Co., 129 U. S. 45; The Alaska, 130 U. S. 201.**"

In **Lynch vs. DeBernal,** reported in **131 U. S. (Appendix) XCIV,** Mr. **Chief Justice Chase,** in delivering the opinion of the Court, said:

> "The question of jurisdiction in this case cannot be determined without **opening the record** and looking into the merits of the controversy.
>
> "The motion to dismiss for want of jurisdiction will, therefore, be denied; but may be argued upon the hearing of the cause. See **9 Wall. 315.**"

Without having the printed record of this Court of some 350 pages at hand, it would be unsatisfactory, if not impossible, to argue the whole case, or even to fully state the case of appellants.

IV.

There is serious dispute as to the fundamental and vital facts, upon which the rights of the intervenors rest. While both the District Judge, in his opinion, and the Circuit Court of Appeals, found, as a fact, that intervenors had rendered valuable professional services to all of the Musicas, both the alleged bankrupts and third parties, strange to say, both Courts denied to the intervenors and appellants the relief prayed for.

The District Judge said:

> "Unquestionably the attorneys rendered valuable services to the Musicas, and I would award them adequate compensation if I could see my way clear to do so, having due regard for the law."

The Circuit Court of Appeals said:

> "The evidence shows the rendition of **valuable legal services by the intervenors** to the Musicas."

We therefore, in order to show to the Court the serious questions involved in the cause, print here the as-

signment of errors filed by intervenors in the Circuit Court of Appeals for the allowance of the appeal to this Court:

ASSIGNMENT OF ERRORS.

UNITED STATES CIRCUIT COURT OF APPEALS.

No. 2541.

ANTONIO MUSICA, ET. AL.,

Appellants.

versus

EZRA P. PRENTICE, ANCILLARY, RECEIVER OF A. MUSICA & SON,

Appellee.

Now comes the law firm of Lazarus, Michel & Lazarus, intervenors herein **pro interesse suo**, and says: That the orders and decrees in the above numbered and entitled cause contain error to the prejudice of the just rights of said intevenors, Lazarus, Michel & Lazarus on the following grounds:

I.

The United States Circuit Court of Appeals for the Fifth Circuit erred in affirming the judgment of the U. S. District Court for the Eastern District of Louisiana dismissing the petition and denying any relief to **intervenors.**

II.

That the said Circuit Court of Appeals erred in holding that the U. S. District Court for the Eastern District of Louisiana, being a court of ancillary jurisdiction, was without right, power or authority to pass upon, enforce and grant the relief prayed for by intervenors claiming under the assignment made by the bankrupts, Antonio Musica and Philip Musica, to secure attorneys fees, or to pass upon the legal and equitable rights and liens of attorneys for services rendered and to be rendered, and in further holding that the said U. S. District Court must remit the **WHOLE OF THE FUNDS IN QUESTION** to the Court of primary jurisdiction, to-wit: To the U. S. District Court for the Southern District of New York.

III.

The said Circuit Court of Appeals erred in holding that the assignments of Philip Musica and Antonio Musica, alleged bankrupts, made in favor of intervenors, for services rendered and to be rendered, were void, as being preferences under the Bankrupt Law, whereas under Section 60 (D) of the Bankruptcy Act, as interpreted by the Supreme Court of the United States, payments or transfers of property, to attorneys, in advance, for services rendered and to be rendered, are not unlawful preferences.

IV.

The said Circuit Court of Appeals erred in holding that there was any legal, affirmative, pro-

bative evidence in the record, tending to show that the funds held in the New Orleans National Bank, as custodian of the First City Criminal Court, against which funds appellant's assignments were intended to operate, were the property in whole, or in part, of the bankrupt estate of **A. Musica & Son.**

V.

That the said Circuit Court of Appeals erred in treating as evidence, as against intervenors, the so-called sworn admissions of Lucy Grace Musica and Arthur Musica set out in the record on the ground that the same are not and were not entitled on their face, and are not and were not identified with any trial or judicial proceeding had, or to be had, in the cause at bar or any other judicial proceeding whatever, and on the further ground, that there is neither intrinsic or extrinsic evidence in any form in this record, tending to identify the said respective so-called affiants with Lucy Grace Musica and Arthur Musica parties on the record and appellants herein, as the same persons who purported to make, and were said to have signed, said respective so-called sworn admissions, and on the further ground, that neither the terms of said so-called sworn admissions as appears on the face thereof, nor any other evidence or fact in the record, direct or indirect, original or collateral, shows or tends to show, any of the circumstances or conditions under which said so-called sworn admissions, if made, were made or procured to be made, and for the further reason, that there is no evidence, either extrinsic

or intrinsic, on the face of the record, or on the face of said pretended and so-called sworn admissions, tending to show that the so-called affidavits were genuine and bona fide voluntary admissions, or that the same had been voluntarily made by the appellants, Lucy Grace Musica and Arthur Musica respectively, parties on the record, and upon the further ground and for the further reason, that there is not outside and beyond said so-called sworn admissions a scintilla of legal evidence in the record, tending to show that any part of the identical money, property and funds in question held by the New Orleans National Bank as custodian of the First City Criminal Court of New Orleans, belonged to the bankrupt estate of A. Musica & Son, or that the same were not the respective property, money and funds of Lucy Grace Musica and Arthur Musica, and of the other respective parties.

VI.

That the said Circuit Court of Appeals erred in failing and refusing to enforce the assignments severally and respectively made by Lucy Grace Musica and Arthur Musica in favor of intervenors to the full amounts as stipulated therein.

VII.

The said Circuit Court of Appeals erred in holding, as a matter of law, that the assignments to appellants, made by Antonio Musica, Philip Musica, Arthur Musica and Lucy Grace Musica, being for necessary legal and professional services

rendered and to be rendered to the several and respective assignors were wholly void, because the same were executed in the City of New Orleans, after the filing of the petition in involuntary bankruptcy against the firm of A. Musica & Son and against Antonio Musica and Philip Musica, the individual members of said firm, in the U. S. District Court for the Southern District of New York.

VIII.

That the Circuit Court of Appeals erred, after finding that intervenors, (as was also found in the District Court), had rendered valuable and meritorious services, in failing and refusing to allow intervenors reasonable compensation for attorney's fees, for such professional services and advice rendered and given to the bankrupts, Antonio Musica, and Philip Musica, and in not recognizing and enforcing the liens **pro tanto** for attorney's fees, to be paid by preference and priority out of the funds held in the custody of the New Orleans National Bank, for such services and advice as was actually rendered to the alleged bankrupts, Antonio Musica and Philip Musica.

IX.

That the said Circuit Court of Appeals erred in holding and maintaining the jurisdiction of the U. S. District Court for the Eastern District of Louisiana, over the funds in controversy, against the protest of intervenors, made in **limine** for the reason that the so-called Receiver herein was without right, capacity, standing or authority to bring any

proceedings whatever in the said U. S. District Court for the Eastern District of Louisiana, or to stand in judgment therein, because of the fact that neither the pleadings nor the proceedings nor the proof therein showed that said so-called Receiver was ever authorized or directed or empowered to take ancillary proceedings by the Court of Primary Jurisdiction in any court or district outside the Southern District of New York, and because of the further fact, apparent on the face of the record, that the so-called Receiver in this cause is a mere paper official, never having appeared in **propria persona** in the Eastern District of Louisiana, nor taken the oath as ancillary Receiver therein nor given bond as such Receiver, nor qualified in any manner whatsoever in the Eastern District of Louisiana.

X.

That the said Circuit Court of Appeals erred in its interpretation of the purport, meaning and legal effect of the so-called sworn-admissions of Lucy Grace Musica and of Arthur Musica, which said so-called sworn admissions on their face and by their terms do not import and cannot be held, by fair interpretation, to import any disavowal or disaffirmance of the assignments severally executed by Lucy Grace Musica and Arthur Musica respectively, to the intervenors, appellants herein.

XI.

And appellant assigns other errors, patent and apparent upon the face of the record.

> **Wherefore,** Appellant prays that the said decrees herein complained of may be reversed, and that appellant may have an adjudication and a decree in its favor as prayed for in its intervention and in accordance with law and equity as herein specified.

Furthermore, on the face of the record, when printed, there will appear in the petition of the intervenors the allegations challenging the jurisdiction of the District Court of the United States, over the property and funds wrested from the four defendants, out of whose funds intervenors had received assignments. The methods resorted to in this case, to obtain possession of these funds, namely, the false arrest without warrant of law, the search of the prisoners without warrant, the detention of their money under pretense of its use as evidence, which false pretense was subsequently abandoned and finally the writ of sequestration issued without bond, by the District Court, and the orders and injunctive process of the United States District Court issued against the Judge of the State Court and his depository, the Bank, for the purpose of wresting the property from the State Court,—property which had been taken from the four defendants by violence and in fraud of law, we propose to show, are methods of procedure or methods of acquiring jurisdiction that are not only in excess of the rightful or lawful jurisdictional powers of the District Court, but violative of the constitutional rights of the

defendants, which the record shows were specially pleaded,—methods which have never heretofore been justified or upheld in the history of the Federal Courts, and which are without precedent in English or American jurisprudence.

V.

In conclusion, we submit:

1. That no printed record in this cause having been submitted to appellants or to the Court, the motion to dismiss or affirm should be postponed until the regular hearing of this cause.

2. That the question of jurisdiction in this case cannot be determined without opening the record and looking into the merits of the controversy, hence the motion to dismiss should be referred to the regular hearing of the cause.

3. That if the Court should consider the cause at all by a reference to the only transcript on file in this Court, the motion to dismiss should be denied in accordance with the settled jurisprudence of this Court, expressly allowing a right of appeal in a case of this nature

4. That it is the time-honored practice of this Court not to entertain a motion to affirm, unless there is color of right to the motion to dismiss.

5. The assignment of errors of appellants set out hereinabove, show that the questions raised are serious and not frivolous, and that this appeal has not been taken for delay.

Respectfully submitted,

HENRY L. LAZARUS,
HERMAN MICHEL,
ELDON S. LAZARUS,
DAVID SESSLER,
Appellants in Propriis Personis.

GIRAULT FARRAR,
Of Counsel.

May 4, 1914.

LAZARUS, MICHEL & LAZARUS v. PRENTICE, RECEIVER OF MUSICA.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 1012. Motion to dismiss or affirm submitted May 4, 1914.—Decided June 8, 1914.

Under clause 20 of § 2 of the Bankruptcy Act as added by the amendment of June 25, 1910, the bankruptcy courts have ancillary jurisdiction over persons and property within their respective territorial limits in aid of a trustee or receiver appointed in any court of bankruptcy.

Property of the bankrupt when seized by an ancillary receiver or trustee is held by virtue of the terms of the Bankruptcy Act to be turned over to the court of original jurisdiction and no right can be acquired in it by assignment subsequent to the petition which can defeat this purpose.

Under subd. d of § 60 of the Bankruptcy Act, attorney's fees for services in contemplation of bankruptcy are specifically provided for and are subject to revision in the court of original jurisdiction and not elsewhere. *In re Wood and Henderson*, 210 U. S. 246.

The seizure of property of the bankrupt by an ancillary receiver is a summary proceeding and not a plenary suit and the decision of the bankruptcy court in the jurisdiction of seizure that an intervenor claiming by virtue of an assignment of the bankrupts made after the petition and in payment of attorney's fees must assert the claims in the court of original jurisdiction is an administrative order, and the order of the Circuit Court of Appeals affirming the same is not reviewable in this court.

A motion to dismiss an appeal from the Circuit Court of Appeals will not be denied as premature because the record has not been printed if the record of proceedings in the District Court is here and this court is sufficiently advised as to the situation of the case to dispose of it without doing injustice to the parties. *National Bank* v. *Insurance Co.*, 100 U. S. 43.

Appeal from 211 Fed. Rep. 326, dismissed.

THE facts, which involve the jurisdiction of this court of appeals from the Circuit Court of Appeals in cer-

tain classes of bankruptcy matters, are stated in the opinion.

Mr. H. Generes Dufour and *Mr. Edwin T. Rice* for appellees in support of the motion.

Mr. Henry L. Lazarus, Mr. David Sessler, Mr. Girault Farrar, Mr. Herman Michel, and *Mr. Eldon S. Lazarus* for appellants, in opposition to the motion:

This court has jurisdiction of the cause of the appellants. See in support of this proposition: *Houghton* v. *Burden*, 228 U. S. 161; *Greey* v. *Dockendorff*, 231 U. S. 513; *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545; *Hewitt* v. *Berlin Machine Works*, 194 U. S. 296; Bankruptcy Act, § 24a; acts of Congress, March 3, 1891, 26 Stat. 828, c. 517, § 6; Judicial Code, 1912, §§ 128, 241.

No printed record having been submitted to appellants or to the court, the motion to dismiss or affirm should be denied or be postponed until the regular hearing of this cause. *Power* v. *Baker*, 112 U. S. 710; *Crane Iron Co.* v. *Hoagland*, 108 U. S. 5; *National Bank* v. *Ins. Co.*, 100 U. S. 43; *Waterville* v. *Van Slyke*, 115 U. S. 290.

A motion to affirm coupled with a motion to dismiss will not be entertained unless there is color of ground in the motion to dismiss. *Chanute City* v. *Trader*, 132 U. S. 213, and cases cited therein.

The question of jurisdiction in this case cannot be determined without opening the record and looking into the merits of the controversy, and hence the motion to dismiss should be denied or deferred to the hearing on the merits. *Lynch* v. *De Bernal*, 131 U. S. (Appendix) XCIV.

The questions raised by this appeal are serious and not frivolous.

MR. JUSTICE DAY delivered the opinion of the court.

This is a motion to dismiss the appeal of Lazarus, Michel & Lazarus, interveners in a certain bankruptcy proceeding in the District Court of the United States for the Eastern District of Louisiana, where the intervening petition was dismissed (205 Fed. Rep. 413), which order was affirmed on appeal to the Circuit Court of Appeals for the Fifth Circuit (211 Fed. Rep. 326). The interveners now attempt to bring the case to this court by appeal on the ground that the judgment of the Circuit Court of Appeals was not final in the proceeding.

The facts are not materially in dispute, and, as found by both the District Court and the Circuit Court of Appeals, appear to be: Antonio Musica and Philip Musica were partners in trade under the firm name of A. Musica & Son, importers of hair in the City of New York. They had become largely indebted and on the nineteenth of March, 1913, a petition in involuntary bankruptcy was filed in the District Court of the United States for the Southern District of New York against the firm and the individual members thereof, and a receiver was appointed of the bankrupt estate, the partnership and its members being subsequently adjudicated bankrupts. On the same day the petition was filed the bankrupts and Arthur Musica were arrested as fugitives from justice in the City of New Orleans, and Lucy Grace Musica was held as a material witness. Upon search there was found upon their persons, variously distributed among them and concealed in divers ways, about $75,000 in money, and notes, mortgages and insurance policies amounting in value to some $50,000 more. Without going into detail, upon the admissions of the parties it became perfectly apparent that the property in question belonged to the bankrupt estate. The District Court for the Eastern District of Louisiana, upon petition, confirmed the receiver

as temporary receiver of that court and directed that all the property be turned over to him to be transmitted to the trustee or trustees in bankruptcy of A. Musica & Son elected and qualified in the District Court for the Southern District of New York, to be disposed of under and subject to the orders of that court.

While the Musicas took the case to the Circuit Court of Appeals, no appeal has been sued out by them to this court, and the only questions here concern the intervention of Lazarus, Michel & Lazarus, who, on April 28, 1913, filed an intervening petition in the District Court for the Eastern District of Louisiana, claiming $15,000 as attorney fees for services rendered the Musicas in the proceedings against them in the courts of Louisiana to protect their property rights and possession and for services to be rendered in representing them in proceedings in New York, if their services were there required. The decree of the District Court which was affirmed in the Circuit Court of Appeals, dismissed the petition in intervention of Lazarus, Michel & Lazarus, reserving their right to assert whatever claim they may have in the bankruptcy court of original and primary jurisdiction.

The filing of the petition and adjudication in the bankruptcy court in New York brought the property of the bankrupts wherever situated into *custodia legis*, and it was thus held from the date of the filing of the petition, so that subsequent liens could not be given or obtained thereon, nor proceedings had in other courts to reach the property, the court of original jurisdiction having acquired the full right to administer the estate under the bankruptcy law. *Mueller* v. *Nugent*, 184 U. S. 1; *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300. Under clause 3 of § 2 of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, the receiver in the original case would have had the right, acting under authority of the court, to take possession in a summary

proceeding of the bankrupts' property, found as was this, in possession of those admittedly holding it for the bankrupts, and to hold the property until the qualification of the trustee or until the bankruptcy petition should be dismissed, if that should happen. *Bryan* v. *Bernheimer*, 181 U. S. 188; *Mueller* v. *Nugent*, *supra*. Prior to the amendment of June 25, 1910, c. 412, 36 Stat. 838, this court had held that in cases where the bankruptcy court of original jurisdiction could itself make a summary order for the delivery of property to the trustee or receiver the court of ancillary jurisdiction could do so (*Babbitt* v. *Dutcher*, 216 U. S. 102), and by clause 20, added to § 2 by the amendment of June 25, 1910, the bankruptcy courts were specifically given ancillary jurisdiction over persons or property within their respective territorial limits in aid of a trustee or receiver appointed in any court of bankruptcy. Under this amendment there can be no question that the District Court in Louisiana had authority to appoint a receiver and to take summary proceedings for the restoration of the bankrupts' estate which was in the custody of people having no right to it, in order that the same might be turned over to the bankruptcy court having jurisdiction for administration. Under the circumstances here shown, there can be no question that this authority was properly exercised in this case.

The property when seized was by virtue of the terms of the Bankruptcy Act held for and to be turned over to the court of original jurisdiction, and no right could be acquired in it by assignment subsequent to the filing of the petition which would defeat this purpose. Such assignment was a mere nullity, properly disregarded by the bankruptcy court, and notwithstanding which it could direct the delivery of the bankrupts' property to the receiver by summary order. *Babbitt* v. *Dutcher*, *supra*. There is no contention that Lazarus, Michel & Lazarus had any lien upon this property at the time of the appre-

hension of the parties and the seizure of the property. Whatever rights they had are asserted to arise by virtue of the assignments made April 1, 1913, and after the filing of the original petition in bankruptcy.

For an attorney fee for services to be rendered in contemplation of bankruptcy the act makes specific provision in subdivision *d* of § 60, and the amount thus attempted to be used in contemplation of bankruptcy proceedings is subject to revision in the court of original jurisdiction and not elsewhere. See *In re Wood and Henderson*, 210 U. S. 246.

The contention of the appellants and the proposition upon which they rely to sustain jurisdiction in this court is that by their intervention in the proceeding in the United States District Court in Louisiana they initiated a controversy in the bankruptcy proceeding, which is appealable to this court from the Circuit Court of Appeals, as are ordinary cases in equity where original jurisdiction does not rest on diverse citizenship entirely (Judicial Code, § 128). To maintain that proposition *Hewit* v. *Berlin Machine Works*, 194 U. S. 296; *Coder* v. *Arts*, 213 U. S. 223; *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545; *Houghton, Receiver*, v. *Burden*, 228 U. S. 161, and cases of that character are cited. In those cases it was held that controversies arising in bankruptcy, in the nature of plenary suits, concerning property claimed by others than the bankrupt do not come under the special provisions of the Bankruptcy Act governing petitions for review and appeals, but take the course of ordinary cases in equity and are not final in the Circuit Court of Appeals where other cases of a similar character would not be.

The Bankruptcy Act provides for review under § 24b of administrative orders and decrees in the course of bankruptcy proceedings which are not made specially appealable under § 25a. And controversies arising in bankruptcy proceedings, of the character of which we

have spoken, under § 24a, are appealable like other equity cases. See *Matter of Loving*, 224 U. S. 183. In this case merely ancillary jurisdiction in a summary proceeding in bankruptcy was invoked in the seizure of this property in the hands of those holding it for the bankrupts, and its character could not be changed or enlarged by the attempted intervention of Lazarus, Michel & Lazarus under alleged assignments of the property made after the filing of the petition in the original bankruptcy proceeding. We think the District Court was right in holding, and the Circuit Court of Appeals right in affirming its decision, that whatever claim Lazarus, Michel & Lazarus had under the circumstances here shown must be asserted in the court of original jurisdiction. The attempted intervention in the ancillary proceeding did not give jurisdiction over a controversy in bankruptcy appealable under the Judicial Code to the Court of Appeals and thence to this court. This conclusion must result in the dismissal of the attempted appeal here.

It is contended, however, that this motion is premature, because the record in this case has not been printed. It is true that ordinarily such motions made before the record is printed must be accompanied by a statement of facts upon which they rest or by printed copies of so much of the record as will enable the court to understand the case. Under the present practice it is permissible to file the record printed in the court below, and we have a printed transcript of the proceedings in the District Court. In this printed record matters which the briefs do not dispute are shown, and we think we are sufficiently advised as to the situation of the case to dispose of it now without doing injustice to the parties. *National Bank* v. *Insurance Co.*, 100 U. S. 43.

We reach the conclusion that this appeal

Must be dismissed.